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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 134

A/S. J. LUDWIG MOWINCKELS REDERI, ET AL., *Appellants*,

v.

ISBRANDTSEN COMPANY, INC., ET AL.

No. 135

FEDERAL MARITIME BOARD, *Appellant*,

v.

THE UNITED STATES OF AMERICA, ET AL.

Appeals from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEE, ISBRANDTSEN COMPANY, INC.

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OPINIONS BELOW

The final opinion of the District Court (R. 118) is reported at 96 F. Supp. 883 (S. D. N. Y. 1950). The opinion of the District Court in connection with the granting of the temporary injunction is reported at 81 F. Supp. 544 (S. D. N. Y. 1949). The report and order of the Federal Maritime Board (R. 51, 67) are reported at 3 F. M. B. —.

JURISDICTION

The judgment of the District Court was entered on April 5, 1951 (R. 148). The petitions for appeal w presented on May 16, 1951 (R. 150, 155), and were allo ed on May 17, 1951 (R. 151, 155). The jurisdiction of this Court is conferred by 28 U. S. C. § 1253.

QUESTION PRESENTED

The Federal Maritime Board and its predecessors sought to authorize two Conferences of common carriers operating in the North Atlantic trade to employ the exclusive patronage contract, or dual rate, system, under which the carriers established and proposed to effectuate two rate scales, one of which represents an increase over the other by the addition of an arbitrary differential of 20 percent.[1] Both rate scales are applicable to precisely the same transportation service, but the lower rate scale is made available only to shippers who contract in advance to route all of their shipments exclusively via the Conference lines; the higher non-contract rates are charged all shippers in the trade who decline to sign an exclusive patronage contract, or who breach the contract by patronizing another carrier. No question is presented here as to the *Conference system* as distinguished from the *contract system*. The principal question raised as to the contract system is:

1. Does the exclusive patronage contract system, by charging a substantially higher rate for identical transportation services to any shipper who insists upon his right to patronize an independent carrier, retaliate and discriminate against such shipper for patronizing another carrier

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[1] Because the non-contract rates were arrived at by rounding out to the nearest five cents a 20 percent increase over the preexisting rates, for various commodities the actual differential varied from 20 to 30 percent (R. 861).

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in violation of Section 14(3) (46 U. S. C. § 812(3)) of the Shipping Act of 1916, which provides in pertinent part:

> No common carrier by water shall, directly or indirectly * * *
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

STATEMENT

This case is on appeal from a final order of a three-judge statutory court which permanently enjoined the institution by appellant Conferences of the exclusive patronage contract system in trade between ports on the North Atlantic coast of the United States and continental ports in Belgium, Holland and Germany, commonly known as the North Atlantic trade (R. 148-149).

1) The Parties

Appellee, Isbrandtsen Company, Inc., organized under the laws of the state of New York, is an American-flag carrier by water in the transportation of property between ports on the North Atlantic coast of the United States and the Gulf of Mexico and ports in various parts of the world, including continental ports in Belgium, Holland, and Germany. For more than twenty years Isbrandtsen has been engaged in regularly-scheduled common carrier service in the North Atlantic trade. Since 1933, appellee has maintained a minimum of twice-monthly berth sailings on this trade route, and since the end of government control on March 2, 1946, Isbrandtsen has operated such berth service in the North Atlantic trade exclusively as an American-flag common carrier (R. 255).

Appellants are two voluntary associations of common carrier steamship lines organized under Section 15 of the

Shipping Act of 1916 (46 U. S. C. § 814) into two steamship conferences, the North Atlantic Continental Freight Conference and the Continental North Atlantic Westbound Freight Conference, operating east and west bound, respectively, in the North Atlantic trade (R. 256). Apart from Isbrandtsen, during the entire period since 1931, all of the other common carriers regularly in the North Atlantic trade, both foreign-flag and American flag, have been members of one or the other of the appellant conferences (R. 386).

The conferences exist primarily as rate-fixing mechanisms. By consultation among themselves, the member lines agree upon a single joint tariff to be filed with the Board by each conference on behalf of all of its member lines. The shipper pays the rate specified in the Conference Tariff regardless of the particular conference line that may carry his freight. Any shipper desiring to alter the published conference rate must have the matter referred via an individual conference carrier or the conference chairman to the conference rate committee (R. 669). Each of the conferences involved here operate pursuant to a unanimous voting provision under which any line, foreign-flag or American-flag, may veto any proposed rate change (R. 1074).[2] Because the voting is confidential,

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[2] It is this very surrender of control over its own rates entailed in conference rate-making procedures that render the conferences peculiarly obnoxious to Isbrandtsen. As appellee's Vice President Crinkley described the result of conference rate-making procedures (R. 411):

> A. No, I am coming smack on to the other thing, and that is this: Why don't we join these groups? When we join, or if we join this group, at that instant two things would happen concerning freight rates. From that point on, we, as a carrier, would never have anything to do with what freight rates were applied on shipments moving on our ships. We might have a voice in the Rate Committee Bureau—we would be one of 14 lines, with the rates being fixed on majority vote.
>
> Q. (Mr. Hupper) You know it is done by unanimous vote, don't you?

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neither the shipper nor the Board knows which individual line vetoed a proposed rate adjustment (R. 668).

Since the inception of this case, these conferences have been composed of seven foreign-flag lines and four American-flag lines (R. 594).[3] However, "carriers may enter or withdraw from the conference at will" (R. 213), and conference membership entails no continuing obligation to stay in the trade. Consequently, the international complexion of conference membership alters from time to time as lines enter and depart the trade, join and leave the conferences. For example, only four present members of the Eastbound Conference were members prior to World War II; six carriers joined since March 2, 1946; and three Canadian lines

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A. I don't know that.

Q. I think you will find out that is right.

A. That makes it much worse, in my opinion, for then the American shipping interests may be seriously endangered by some one line that has no interest in this business whatever. Some of the lines don't call at all of the ports, and yet one line calls at this port, and by his single vote could upset another port.

But let me finish what I was saying, and that is this: When we join a Conference, if we did that, at that minute, even with the unanimous vote there, we would lose control of what we might charge. We might upset something the others were doing, but we have nothing to do with what we charge. And at that minute the shippers would not see any occasion when there was any competitive force brought to play on the rail (sic) level.

Q. Well, you are aware that this entire Conference situation and rate situation is policed actively by the United States Maritime Commission, aren't you?

A. I wish I could say I agree with you, but I don't believe it, sir. I don't believe it is policed. Sufficiently, let me add that—sufficiently.

[3] A/S. J. Ludwig Mowinckels Rederi, Black Diamond Steamship Corporation, Compagnie Generale Transatlantique, Compagnie Maritime Belgie, Cunard White Star, Ltd., Ellerman's Wilson Line Ltd., Dampskibsselskabet af 1912 A/S, A/S Dampskibsselskabet Svendborg, United States Lines Company, N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, Waterman Steamship Corporation, and South Atlantic Steamship Lines, Inc.

withdrew in 1948 (R. 212-213). In the aggregate, the Eastbound Conference offered 498 berth sailings in 1947, and 518 in 1948 (R. 255-56).

Isbrandtsen, which the Board noted (R. 53) "had a history of ocean shipping operation independent from conference ties", is not a member of either conference but is in competition with both in the North Atlantic trade, in which it operated 38 berth sailings in 1948. Down through the years, as the only regularly scheduled non-conference common carrier continuously in the trade (R. 386), Isbrandtsen, the Examiner found, "has effectively acted as a check on respondents' [Conferences'] rates and services" (R. 261).

At the time this suit was instituted, the Conferences had in effect conference tariffs constructed on a single rate scale which largely represented the War Shipping Administration's wartime rate scale (R. 258). While some adjustments had been made since March 2, 1948, the rate level on October 1, 1948 was substantially Tariff No. 17, which had been approved for wartime operation by the War Shipping Administration and which made allowance for many war-inflated cost factors such as war risk insurance, bonus payments to seamen and high oil charges. Tariff No. 17 also included a flat surcharge of 15 percent, which was likewise continued in effect in the Conference Tariff after return of shipping to private operation on March 2, 1946.[4]

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[4] The Examiner found that on 581 commodities, Isbrandtsen's rates were "from 3.3 percent to 53.4 percent lower than the conference rates" (R. 236-237). A measure of the level of existing tariff rates which the Conferences proposed to convert into contract rates on and after Nov. 1, 1948, is afforded by a comparison of the rates that prevailed before and after World War II. Mr. Crinkley, Isbrandtsen Vice President in Charge of Traffic, compared the pre-war and post-war rate situation (R. 379-380):

> A. Let me say that I have no reverence whatsoever for a Conference rate as such. I don't believe the time has ever been in the commerce of this country when anybody could say that the Conferences, any one of them or all of them, have set up a tariff where the rates are very reasonable and take into

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2) The Exclusive Patronage Contract System

On October 1, 1948, appellant carriers summarily notified all known shippers in the North Atlantic trade that, effective November 1, 1948, the exclusive patronage contract-non-contract rate system would be instituted simultaneously in both east- and westbound trades covering all commodities transported in those trades, with insignificant exceptions.[5] Under the exclusive patronage system thus held out to the public, the conferences proposed to create dual rate scales by *adding* an arbitrary differential of 20

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consideration all of the factors of trade. I don't believe anythink like that has ever happened, and accordingly, for somebody to assume that because a Conference has got a rate here, and I quote this, that we are necessarily cutting their rate. That is just foolishness.

Before the war, the rate on leaf tobacco to Hamburg and Antwerp was 50 cents a hundred pounds with independent competition. On January 1, 1948 it was $3.20. Then the JETA (sic: JEIA, i.e. Joint Export Import Agency, R. 444) came in the market with 30,000 tons of tobacco and asked for a quotation. The Conference quoted $3.20. My quotation was $2.25, $20 a ton less.

Now, mind you, to England at the same time, where it is more expensive to carry tobacco since the lines have to deliver to the government warehouses, $2 was the rate. So to England high ports it was $2, Hamburg and Bremen $3.20, Antwerp and Rotterdam $2.90, and for somebody to say that rate is reasonable and if I quote under it I am a chiseler, it is foolishness.

If I quoted the same thing, I would be guilty of embezzlement. I quoted two and a quarter based on American operation, high cost operation, with a good profit.

Now, what could be done with a cheaper operating foreign business is something else. Two and a quarter was a good rate, very satisfactory. I quoted it. We carried a substantial part of the business. The Conference met the rate. The taxpayers of this country saved $600,000 on that transaction because of good, clean competition that was there working, not chiseling the Conference rate, but setting rates that were very fair and quite profitable.

[5] I.e., human ashes, coal and coke in bulk, corpses, household or personal effects, explosives, grain in bulk, livestock, and lift vans (R. 257).

percent to the existing rate scale. No *reduction* under the existing rates was involved (R. 454). The higher, so-called non-contract rate scale, was to be applied to any shipper who continued after November 1, 1948 to patronize independent non-conference carriage such as that supplied by Isbrandtsen. The existing so-called contract scale, which prior to November 1, 1948, had been applied uniformly to all cargo in the trade moving on Conference vessels, was to be available after November 1, only to shippers who contracted in advance to confine all their shipments in the North Atlantic trade to conference vessels (R. 258).

a) *Increased Rate for Identical Transportation Service.*

While undertaking to differentiate between "contract" and "non-contract" shippers, the conference lines did not undertake to tender to the trade any different transportation services after November 1, 1948 than had been purveyed prior to that date, and the notice to the shipping public made it perfectly clear that precisely the same transportation services would be furnished the shipper, irrespective of whether he paid the contract rate or the newly established, higher non-contract rate. The proposed system, therefore, contemplated that two shippers seeking to ship the same articles, on the same vessel, on the same day, between the same two ports, might well be charged different rates, depending entirely on whether each had agreed to patronize the conference lines exclusivly (R. 456).[6] The

[6] Appellants' witness, Mr. Rosenthal, conceded the absence of any other basis for the application of different rates (R. 793-794):

> Q. Now, is it your understanding that under the dual rate system maintained by the Conference in connection with the contract rate, that the sole distinction there with respect to, and as a basis for, the applicability of the higher rate, is whether or not you have agreed as a shipper to confine your patronage to Conference Lines exclusively?
>
> A. Yes. As I understand it, if I do not sign a contract in which I agree to confine my business to Conference Lines, if

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non-contract shipper might tender several times as much tonnage as the contract shipper and still be assessed the higher rate. Regardless of which rate was paid, the Examiner found that "the cargo of both are transported on the same vessel and with the same degree of care, and the paper work incidental thereto is the same" (R. 237).

b) *Conference Assumed No Obligation to Supply Carriage.*

While the exclusive patronage contract tendered the trade on October 1, 1948 (Appendix A to this Brief), was principally remarkable for its establishment of different rates for identical transportation services, the contract was also striking in several other respects. Notably, the proposed contract merely obligated the merchant to effect, via conference lines, all of such export shipments as he might make in the North Atlantic continental trade. There was no obligation on the merchant to export any commodities at all (R. 259). By the same token, under the proposed contract, the conference lines agreed to furnish the merchant at contract rates only that "space in such vessels as they may respectively load at said loading ports for transportation and dispatch at the ports desired, provided that suitable unbooked space is available therein when the merchant makes application" (R. 259). As the court below interpreted this provision (R. 128), "This apparently means that, to a shipper who signs an exclusive patronage contract, the conference carriers agree to supply no transportation facilities, except as the conference members may see fit to provide them from time to time." Certainly, no individual conference line undertook to make available any

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I then ship over a Conference Line, I pay the non-contract rate.

Q. The reason for that being no other than the fact that you have not agreed to confine your patronage to the Conference vessels?

A. Yes.

unbooked space, or, indeed, to stay in the trade at all, even during the life of the contract. It is true that the contract left the shippers "free" to secure space elsewhere if the Conference failed to provide it, but the shippers were well aware that this freedom was meaningful only if non-conference carriage was available.[7]

c) *Inadequate Rate Protection Offered Shipper.*

Respecting rates, the contract provided that the rates specified therein, which were the then existing Conference Tariff, might be increased from time to time during the life of the contract. Any notice of such an increase was to be deemed accepted by the merchant unless he notified the conference of his non-acceptance within 20 days. In such event, the conferences reserved the right to cancel the merchant's contract on 60 days' written notice (R. 259-260). At best, this provision assured the shipper of rate protection for only eighty days, although the Conference experts, themselves, maintained that protection for a year was necessary to provide adequate opportunity for forward trading (R. 785). Of course, the cancellation privilege was of real benefit to the Conferences, but, again, the merchants were aware that it was meaningless to them in the absence of non-conference carriers.

Furthermore, the contract to be effectuated on November 1, 1948, was, as the Examiner described it, "an all-com-

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[7] As appellants' own transportation expert conceded (R. 777, 783):

> Q. You appreciate, do you not, that the provision allowing you to secure space elsewhere is meaningful for a shipper only in the event there is an independent in the trade?
>
> A. Yes, sir.
>
> * * *
>
> Q. I asked you earlier whether you saw any obligation on the part of the Conference Lines to carry cargo, and you said no. Is that right?
>
> A. I said no, based on the fact that if they wished to withdraw all their sailings, there is nothing under this contract that would compel them to put a sailing on berth.

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modity agreement, i.e., the shipper is obligated to use the conference lines for all his cargo. The net result is that if the conference gives notice of an increase in rates on any of the commodities covered by the contract the shipper must agree thereto or else he loses the benefit of the contract rates on his other commodities. For example, if the shipper were to export 25 commodities and the increase is on one only, his position on the other 24 would be jeopardized if he failed to accept the increase on the one. This would be a clear-cut case of the tail wagging the dog, and it would be manifestly unfair to saddle the shipper with this choice" (R. 246). Despite this biting criticism of the proposed contract system by the Examiner, the Board approved this aspect of the proposed contract system without even discussing the matter.

d) *Shipper Subject to Severe Penalties.*

Among other jeopardies to which the proposed contract subjected the shipper was the threat that, if the merchant made a shipment in a non-conference line in violation of the contract, the shipper would be liable for twice the amount of freight that would have been payable if the shipment had been effected under the contract over conference lines.[8] The contract also conveyed to the carriers the option to terminate the agreement for such a violation, thereby rendering the shipper liable for the higher non-contract rates on future shipments effected via conference lines (R. 259). The contract imposed no reciprocal penalty for breach on the part of the conference lines presumably because they assumed no obligation capable of being breached (R. 776). Curiously enough, the option reserved to the Conferences to impose the penalties for breach was the only feature of the proposed system which the Board

[8] In *Pacific Westbound Conference et al* v. *Leval & Co., Inc.*, July 16, 1951, #192-485, a Circuit Court of the State of Oregon refused enforcement of a similar conference contract penalty.

found objectionable. The Board required that the imposition of the penalties be made mandatory (R. 65).

e) *Contract Made Shipper Continually Dependent on Conference.*

Respecting the term of the exclusive association, the contract provided that it should continue in effect for a period of 14 months from November 1, 1948 to December 31, 1949, and thereafter, in the words of the Board, "the agreement shall continue in effect throughout consecutive subsequent years subject to the right of either the shipper or the carriers to terminate it as of December 31 in any year by giving the other party 90 days' written notice of termination" (R. 56). This "right" of termination was also of substance to the shipping public only in the event that, at the end of any contract year, non-conference carriage was actually available in the trade as an alternative to conference services.

f) *Contract System Created Power to Discriminate.*

Finally, the projected dual rate system was peculiar in that it was not proposed to apply to all shippers alike, big and small, public and private, as had been the case with the single rate system. Because governmental agencies were prevented by law from entering into any arrangement which interfered with the competitive purchase of transportation service, the Government, which was one of the largest exporters in the trade and which was competing with private exporters (R. 639), was not to be compelled to sign a contract in order to enjoy the lower contract rates (R. 429). Neither was the powerful Automobile Manufacturers' Association which declined to sign the contract when it was presented to it, but which was informed by the Conference that it would be eligible for contract rates nonetheless (R. 224, 898-903).

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g) *Record Silent As to Reasons for Use of System In This Particular Trade.*

At the time of the attempted institution of the contract system involved here, the Board had approved approximately 100 conferences in various trades around the world. Of this number, only 24 conferences were attempting to make active use of the dual rate system at the time of the Board's decision challenged here. While the conferences had employed the dual rate system in the North Atlantic trade to a limited extent prior to World War II, they had never applied it to more than approximately 360 commodities out of the total of approximately 1800 commodities moving in the trade.[9] Consequently, the attempt of the conferences to apply the system straight across the board to all commodities moving in the trade represented a sharp departure from the usual practice in the North Atlantic trade.

The record preserves an eloquent silence as to the reasons which motivated the Conferences in seeking for the first time to institute the system on November 1, 1948 on substantially all commodities moving in the trade, and the conditions in the trade which might be thought to have justified the inauguration of the system at that time. At no place on the face of the Conferences' minutes on file with the Commission was there any showing of the reason for the adoption of the contract system in the North Atlantic trade at this time, or any other time (R. 909-911). While the Chairman of the Eastbound Conference, who was the only witness from the trade to testify for the Conferences concerning the dual rate system, indicated there may have been a possibility of the trade becoming unstabilized, he was unable to point to any factors in the trade which were contributing to such "possible" instability (R. 911). However, if the record is silent as to the reasons which underlay

[9] The Examiner found that out of a total of 1700-1900 items in the Tariff, only 706 were under contract (R. 257), and the Chairman of the Conference testified that of these 706 items, no dual rate features were involved in 345 items (R. 740).

the proposed adoption of the contract system on November 1, 1948, the record leaves no doubt of the effect of that adoption.

h) *Exclusive Patronage System Coercive.*

During 1948, Isbrandtsen offered 38 sailings in the North Atlantic trade, while the Conference lines in the aggregate offered 518 sailings (R. 255-56). Most important shippers in the North Atlantic trade who desire to ship a portion of their cargo via Isbrandtsen have need of more frequent service than Isbrandtsen supplies, and each such shipper in the trade must normally secure a part of his transportation requirements from member lines of the Conferences. If the dual rate provisions went into effect, therefore, such shippers would be compelled to sign Conference contracts in order to escape paying the higher non-contract rate on that portion of their cargo which business exigencies required them to ship via Conference lines from time to time.[10]

---

[10] As appellee's Vice President described the dilemma confronting shippers (R. 468):

> A. That is the element of force that I have referred to quite often at this hearing, whereby, in these trades where the Conferences attempt to use this exclusive patronage rate system, such shippers as require more service than my company provides consider they do not have any choice, they are forced to sign these exclusive patronage contracts; and obviously, they could not afford to ship with these Conference lines and pay the non-contract rates. I don't think anybody ever pays the non-contract rates.

Indeed, appellants' own transportation expert candidly conceded the economic coercion to which the contract system subjected the shipper (R. 793):

> Q. Of course, if they (non-conference lines) weren't able to satisfy you, then to the extent you used them (Conference lines) you would have to pay the higher rate?
>
> A. Correct. And if they (non-conference lines) couldn't satisfy me, after all, it probably would be an economic necessity for me to accept the conference contract, and to pay the conference rate on all of my shipments, even if they were higher than the non-conference rate. (Parentheses supplied.)

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Thus, the necessary effect of requiring such shippers in the North Atlantic trade, on or after November 1, 1948, to secure all or none of their transportation requirements from member lines of the conferences was to compel such shippers to cease patronizing Isbrandtsen. In fact, immediately upon conference announcement of the proposed institution of the contract system, many such important shippers, who in the past had shipped part of their cargo with Isbrandtsen, notified the appellee that, when the exclusive patronage contract system went into effect, they would be compelled to cease patronizing Isbrandtsen and to confine all of their shipments to the conference lines.[11] Indeed, out

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[11] While appellants have sought to create the impression that shippers hailed the contract system, the record contains ample evidence of bitter shipper opposition. The only shipper intervenors, Department of Agriculture, Himila International, and Pacific Coast Borax Company, supported appellees opposition to the system (R. 204). From his long experience with shippers, appellee's Vice President testified (R. 431):

> A. My personal feeling, and I feel it very strongly, and it is based on a long experience and a very wide acquaintance with shippers, is that 90 percent or more of the shippers don't like the conference contract system, and if they didn't feel that they were forced to sign it, they would never sign it. I don't know the exact figures, of course, but it is my impression that 90 percent or more do not care for the conference contract system. They think it is an imposition.

This testimony was documented by written communications from shippers opposing the system (R. 1122-1125). Indeed, the penalty imposed by the differential is so severe that Mr. Isbrandtsen testified that his own company was, itself, forced to sign contracts in trades where it was shipping for its own account and did not supply carriage (R. 321):

> Q. (Mr. Hupper) As a shipper, your company has entered into contracts with the Conference lines, has it not?
> A. Yes—in each case under protest.
> Q. You were a free agent, weren't you?
> A. No.
> Q. You signed the contracts, your company did?
> A. Under coercion.
> Q. Who coerced you?
> A. The Conference.

of a total of approximately 4500 shippers solicited, approximately 3000 shippers in the North Atlantic continental trade had executed the exclusive patronage contracts prior to the issuance of an injunction by the United States District Court for the Southern District of New York which enjoined the further solicitation of such contracts pending the determination of this proceeding.

In the present posture of the case, the fact that the patronage system is coercive is conceded on the face of the record. The Examiner found that "it is true, as urged by complainant, that shippers are compelled to sign contracts through economic coercion"(R. 237); and the Board concluded that the conferences realized "***something more than voluntary shipper cooperation must be agreed to" (R. 64). Similarly, on the present record it is admitted that, through the coercion practiced by it upon the shipping public, the exclusive patronage dual rate system would enable the Conferences to monopolize carriage in the North Atlantic trade by forcing independent non-conference carriage out of the trade or into the conference. The Examiner found that "There can be little doubt that the contract system in the present trades, if allowed to become effective, would create a virtual monopoly" (R. 221); and in the

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Q. They threatened you?
A. An inferred threat.
Q. You signed them so as to get the lower rate, didn't you?
A. No.
Q. Why did you sign them?
A. Oh, pardon me, I didn't understand that question.
Q. You signed those contracts, your company did, so as to get the lower rate?
A. I signed them so we wouldn't be penalized by paying the higher rates. That is the way I like to put it.
Q. You wanted the lower rate?
A. I didn't want the higher rate.
Q. That is the way with every shipper of a sane mind, he wants the lower rate effective if he can get it.
A. I am afraid that the other shippers look upon it the same way. They don't want to pay the higher rate; they don't want to be penalized.

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court below Board counsel conceded that "whether the contract system in a particular case actually has the effect of producing a complete monopoly (i.e., control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved" (R. 124-125).[12]

3) Proceedings Below.

Faced with exclusion from access to the patronage which it had developed and serviced over a period of more than two decades through the threatened imposition of the exclusive patronage contract system, Isbrandtsen invoked the jurisdiction of a statutory United States court in the Southern District of New York on October 28, 1948, pursuant to the provisions of the Shipping Act of 1916, as amended, 46 U. S. C. § 830, the Urgent Deficiencies Act of 1913, as amended, 28 U. S. C. §§ 2284, 2321-2225, and the Administrative Procedure Act of 1946, 5 U. S. C. § 1009, to enjoin, set aside, annul and suspend orders and approvals of the Board dated January 2, 1948, approving conference agreement designated by the Board as Conference Agreement No. 4490-6, and August 24, 1948, approving conference agreement designated by the Board as Conference Agreement No. 7920-1. The complaint (R. 1-9) set forth that such approvals had been entered *without notice or hearing*, and alleged that so much of such Board orders and approvals as purported to authorize appellant steamship lines operating in the North Atlantic trade concertedly to coerce shippers in such trade to patronize such lines exclusively, through use of the exclusive patronage contract system, and to retaliate against shippers in such trade who

[12] These admissions were justified by the state of the record. For example, appellants' own transportation expert testified (R. 786):

> I would concede it would make it much more difficult for the independents to stay in business.

patronize Isbrandtsen, violated Section 14 of the Shipping Act, and were null and void.

Simultaneously with the filing of its verified Complaint in the District Court, Isbrandtsen moved the Court for a temporary restraining order and a preliminary injunction to maintain the *status quo* in the North Atlantic trade, until such time as the Court could hear and finally determine the issues.

The District Court found (Opinion, per Rifkind, J. 81 F. Supp. 544) that if the Conferences were permitted to effectuate the dual rate tariff system, Isbrandtsen would be "gravely prejudiced" and on January 13, 1949, the Court granted the temporary injunction prayed for. However, because the Board had approved the contract system without notice and hearing and had indicated to the Court that it would like an opportunity to review the question on a full record, the District Court conditioned its temporary injunction upon the filing by Isbrandtsen of a complaint with the Board challenging the validity of Conference Agreements 4490-6 and 7920-1.

In accordance with that condition, Isbrandtsen filed its Complaint before the Board on February 1, 1949, challenging the validity of so much of the said conference agreements Nos. 4490-6 and 7920-1 as purported to authorize appellant steamship lines, named as members of appellant conferences, to use the exclusive patronage contract-non contract rate system, on the grounds that:

a) Such purported authorizations exceeded the authority of the Commission under Section 15 of the Shipping Act of 1916, as amended (46 U. S. C. § 814) and were absolutely null and void;

b) Such purported authorizations contravened the specific provisions contained in Section 14 of the Shipping Act of 1916 (46 U. S. C. § 812) prohibiting retaliations or discriminations against a shipper for patronizing any other carrier; and

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c) Under Article I, Sec. 1 and Article I Sec. 8, paragraph 18 of the Constitution of the United States, no legislative authority was, or could be, delegated to the Federal Maritime Board to authorize said Conferences, by the use of said contract-non-contract rate system, to exclude Isbrandtsen, or any other person, from engaging in trade or commerce, and under the Fifth Amendment, the authorizations were invalid because they deprived appellee of its property without due process of law.

The Board set the complaint down for hearing before an Examiner who filed his recommended decision on October 5, 1949. This first Recommended Decision made no Findings of Fact, denominated as such, but confined itself to a discussion of the lawfulness, *per se*, of the exclusive patronage contract system, under Section 14(3) of the Shipping Act of 1916. On the latter point, the Examiner concluded that, despite the explicit language of the Section, it did not ban all discrimination, but only "unjust" discrimination, and he further concluded that "the contract system is not unlawful, *per se*, and that it is within the administrative discretion of the Commission, when supported by substantial evidence, to determine in each case whether the system violates one or more sections of the Act." Having concluded that the exclusive patronage system was not unlawful, *per se*, under Section 14, the Examiner recommended that the use of the system in the North Atlantic trades be approved without supporting this recommendation with the "substantial evidence" by which the Board was, in the Examiner's own words, "to determine in each case whether the system violates one or more sections of the Act."

Presumably because of the failure of the Examiner's original recommended decision to supply a solid basis of fact on which the Board could determine whether the use of the exclusive patronage system, in the North Atlantic trades, was violative of any sections of the Shipping Act of 1916, the Board, after oral argument and on December

19, 1949, entered an order remanding the case to the Examiner for further *Findings of Fact.* Upon the petition of complainant, the scope of the remand was enlarged by the following Supplemental Order of the Board, dated January 13, 1950, which, in effect, superseded the order of December 19, 1949 (R. 229):

> ORDERED that the record herein be and it is hereby remanded to Examiner C. W. Robinson
>
> A. With instructions to prepare, serve, and file proposed *findings of fact* supplemental to his recommended decision served October 5, 1949, as to whether the exclusive patronage contract system proposed to be instituted by respondents, and the forms of exclusive contracts to be employed therewith, (1) are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or (2) operate to the detriment of the commerce of the United States, or (3) are in violation of the provisions of the Shipping Act, 1916, and particularly whether they constitute a resort to other discriminative or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason (Emphasis supplied.)
>
> B. With instructions to rule upon the proposed findings of fact and conclusions of law submitted by the Complainant * * *

On February 21, 1950, the Examiner's recommended supplemental decision was filed, presumably in accordance with the foregoing mandate of the Board, which required him to file proposed Findings of Fact. Like its predecessor, however, the supplemental decision failed to make proposed *Findings of Fact*, ascertainable as such. The Examiner did, however, pass on the Findings proposed by Isbrandtsen which he, by and large, adopted. These Findings were not, of course, designed to support the contract system. But, despite the absence of findings to support the

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system, the Examiner again concluded that it did not violate the Act, nor Section 15 thereof.

Before the old Commission could pass upon the recommended supplemental decision of the Examiner, the Commission was abolished. The temporary Federal Maritime Board, which was appointed to succeed the Commission, deferred decision in the case until its permanent successor could be appointed. On October 18, 1950, final argument in the matter was had before the permanent Board, and the Board's decision of December 1, 1950 was served on the parties hereto on December 5, 1950.

At a hearing before the Court below on December 11, 1950, the Court ordered the complaint amended to bring before the Court the Board's order dismissing the complaint, the filing of answers, and the matter set for final argument on December 20, 1950. Pursuant to the order of the Court, Isbrandtsen amended its complaint to challenge the order of dismisal contained in the Board's decision of December 1, as well as the earlier orders of January 2, 1948 and August 24, 1948, purporting to authorize the use of the exclusive patronage contract system in the North Atlantic trades.

The Secretary of Agriculture intervened in support of Isbrandtsen's amended complaint.

The United States answered the amended complaint as statutory defendant (28 U.S.C. § 2322), and confessed error in the Maritime Board's order.

The case was heard on motion by Isbrandtsen for a permanent injunction and on motions by the Conferences and the Board to dismiss Isbrandtsen's amended complaint. On March 20, 1951, the three-judge District Court denied these motions to dismiss and granted the prayer for a permanent injunction.

4) Decision Below.

In the court below, Isbrandtsen contended that the Board's authorizations of the Conference Agreements

were absolutely null and void because they exceeded the authority conferred on the Board by the statute. These authorizations were issued pursuant to Section 15 of the Shipping Act of 1916 (46 U. S. C. § 814) under which the Board is authorized to approve and immunize, to a limited extent, under the antitrust laws, conferences of shipping lines. The Section provides that "the Commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds . . . *to be violation of this chapter* and shall approve all other agreements, modifications, or cancellations." (Emphasis supplied)

Section 14 of the Shipping Act of 1916 (46 U. S. C. § 812), however, provides that no common carrier shall directly or indirectly (1) pay or allow a deferred rebate; (2) use a fighting ship; (3) retaliate against any shipper or resort "to other discriminatory or unfair methods because such shipper has patronized any other carrier".

It was Isbrandtsen's position below that Section 14 was the Shipping Act's "charter of freedom"; that the Section was explicitly framed by Congress to preserve the opportunity for independent competitive carriage in foreign trade; that Section 15 was designed to permit cooperative arrangements among carriers who voluntarily agreed to associate themselves in conferences and to subject themselves to public regulation; and that the two sections read together embodied a Congressional scheme to permit regulated cooperation but to forbid the employment of any coercive weapon designed to monopolize the trade by eliminating independent carrier competition.

The District Court noted that both the Examiner and the Board had found that the dual rate system established a differential of between 20 and 30 percent for identical transportation services and that apparently the only justification for such an arbitrary differential was its tendency "to drive competing non-conference carriage into the con-

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ference or out of business" (R. 128).[13] Consequently, the Court concluded, "here the rates proposed to be charged shippers who do not sign contracts are unreasonably, and therefore unjustly, discriminatory; and the dual-rate provisions which permit such rates are invalid." (R. 127).

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[13] Appellants have questioned whether the District Court was correct in holding that the Examiner and the Board had found the system arbitrary.

At the request of Isbrandtsen, the Examiner found (R. 258):

> 14. Shippers were informed that failure to sign such a contract would entail application of their shipments by respondents' lines after November 1, 1948 of non-contract rates which were fixed by means of an *arbitrary differential* at a level 20% to 30% higher than the currently existing scale. (Emphasis supplied.)

In view of this finding, Isbrandtsen filed an exception to the failure of the Examiner to conclude that the system was not unreasonably discriminatory:

> 21. Page 16. Complainant excepts to the Examiner's holding "there is no evidence in this proceeding as to the reasonableness of the two types of rates". As indicated above, the non-contract rates are obviously unreasonable because established on the basis of an *arbitrary* differential.

While the Board's opinion did not specifically discuss the Examiner's findings and conclusions or Isbrandtsen's exceptions, counsel for the Board in oral argument before the court construed the Board's decision as accepting the Examiner's findings insofar as they were not inconsistent with its own report (R. 75), and the Board's report, itself, recites (R. 66):

We find as follows:

> 1. The findings contained in the report of the examiner are a substantial compliance with the orders of reference of the Commission of December 19, 1949 and Januray 13, 1950.

ARGUMENT.

Introduction.

The principal inquiry here is whether the exclusive patronage contract system, by charging a higher rate for identical transportation services to a shipper who patronizes a non-conference carrier, violates the statutory proscription against retaliation by resort to discriminatory methods against such shipper for patronizing any other carrier.

1. *Contract System, Not Conference System, in Issue.*

To escape the force of the statutory prohibition, the proponents of the contract system have, from time to time throughout the proceedings below, sought to sanction the system by tying it to the conference system (R. 63). However, only the lawfulness of the contract system is involved here, and the lawfulness of that device must be measured by the statutory criteria regardless of the impact on the conference system.

Nothing in the record lends credence to the proposition that the contract system is essential to the continued vitality of the conference system.[14] In the North Atlantic trade, as noted in the Statement, *supra*, the Conferences

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[14] It is Isbrandtsen's view that in permitting Conferences composed of 7 foreign lines and only 4 American lines to use the dual-rate system to maintain rates at the high American cost level, the Board is compelling American shippers to subsidize all lines, foreign and American, instead of the Board subsidizing only American lines in accordance with the spirit of the Merchant Marine Act, 1936 (46 U. S. C. § 1101) As the Examiner summarized these views (R. 211-212):

> Conference rates, according to complainant, generally represent the ceiling of cost of American operation, and therefore the level of conference rates in the present trades is unduly high. There is no objection to American carriers having rates that will enable them to stay in business. Since the cost of foreign-flag operation is lower, a rate level satisfactory to American lines should be even more satisfactory to the foreign lines, and to that extent the foreign lines enjoy a subsidy. It is contended that the American ceiling is an umbrella for

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have flourished although they have never applied dual rates to more than 20 percent of the commodities in the tariff, and they have not employed the system at all since 1939. Out of more than 100 conferences presently authorized by the Board, not more than 24 are attempting to make active use of the system in any degree. Ironically enough, the only example furnished by the record here of the "cut-throat" competition which the system is supposed to avoid was the rate war which developed among the members of the India-European and United Kingdom Conference, which was employing the exclusive patronage deferred rebate system and had monopolized the trade at the time the internal war was started (R. 495).

In any case, the threat of chaos engendered by rate wars, even if real, could not serve to nullify a clearly expressed Congressional mandate.[15] No one has had the temerity to

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foreign operators and not for complainant, and that if the conference rates are based on American costs and there are a number of foreign lines with lower costs, the foreign lines "have quite a bonanza." Under such a set-up complainant thinks foreign vessels will gradually push American vessels to one side, and as cargo falls off the foreign lines can stay in the trade longer and may also increase their service.

If conferences are well run complainant believes that the weight of the membership would always be an influence to attract business without the use of the contract system, and that American lines are incurring a certain amount of ill will by using it. In complainant's opinion, the advent of the system was an important factor in decreasing American participation in the various trade routes, and it has not benefited the commerce of the United States or contributed to the development of the American merchant marine. Furthermore, it does not foster the American merchant marine to make it difficult for an American carrier to stay in the trade unless he chooses to accept the terms of a group of lines. Prior to 1935 American vessels were decreasing in number in competition with foreign vessels, and at the present time foreign lines are putting on additional vessels in our trade routes when American lines are not able to do so.

[15] *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 449, 506-510 (1935).

suggest that the Board could approve the deferred rebate or the fighting ship because of the supposed essentiality of those prohibited devices to the survival of the conference system. No more can a violation of Section 14(3) of the Act, which outlaws retaliation and discrimination against a shipper for patronizing another carrier, be justified by some supposed accommodation of the evils prohibited by that section to the needs of the Conference system.[16] If the contract system retaliates or discriminates against a shipper for patronizing any other carrier, then Congress with plenary power to decide the conditions under which Conferences should operate, has determined that conferences should be denied the privilege of employing such a weapon against non-conference competition. Private choice of means necessarily yields to the national authority thus exerted, and it is outside the competence of the Board to inquire whether the legislative determination was beneficent or harmful. *Eastern States Retail Lumber Association* v. *United States*, 234 U. S. 600, 613 (1914); *United States* v. *Masonite*, 316 U. S. 265, 281 (1942). It follows that the Board is precluded from authorizing for any reason any of the practices or devices specifically proscribed by Congress, and that, whatever the virtues or vices of the conference system, the contract system must here be independently scrutinized to determine its lawfulness under Section 14.

2. *Statutory Criteria.*

The major question of statutory construction involved in this case is whether the exclusive patronage contract sys-

[16] *Cf. Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49 (1912):

> "* * * The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

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tem constitutes a violation of Section 14 of the Shipping Act of 1916. If it does, it may not be approved under Section 15 of the Act which provides in pertinent part:

> The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, *or to be in violation of this Act*, and shall approve all other agreements, modifications, or cancellations. (Emphasis supplied.)
>
> * * *
>
> All agreements, modifications, or cancellations made after the orgainzation of the Board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Under Section 15, every conference agreement is unlawful until approved, and the Board is authorized to approve only "such agreements as it does not find" to be in violation of the Act. *United States Navigation Co.* v. *Cunard*, 50 F. 2d 83 (2d Cir., 1931), aff'd, 284 U. S. 474 (1932). If, therefore, the dual rate system constitutes a violation of any of the regulatory provisions of the Shipping Act, the board is powerless to approve it under Section 15.

Section 14 of the Act defines three violations which are made crimes: Subsection (1) defines and prohibits the use of "deferred rebates"; Subsection (2) defines and interdicts the use of a "fighting ship"; and Subsection (3) forbids any carrier "directly or indirectly" to

> Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair

methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

The inquiry which naturally emerges from thus contrasting the statutory criteria with the practice and effect of the exclusive patronage contract system is whether the Board could authorize a coercive rate differential designed to drive independent competition out of business in the teeth of a clearly expressed Congressional determination to preserve independent carriage in our foreign trade.

3. *Characteristics of Contract System.*

In applying the statutory criteria to the contract system, this brief will be addressed to the following characteristics of that system which stand conceded on the present record:

a. For precisely the same transportation service, the exclusive patronage contract system establishes two sets of rates, one of which is higher by an arbitrary differential of 20 percent;

b. The sole consideration entitling a shipper to the lower contract rate in his agreement not to patronize another carrier;

c. The higher non-contract rate is charged a shipper for identical transportation service solely because he reserves the right to patronize another carrier;

d. The shipper is coerced into signing the exclusive patronage contract to escape the imposition of the higher non-contract rates on that part of his transportation requirements which business exigencies require him to seek from conference carriers using the system; and

e. The effect of the application of the exclusive patronage system to all commodities moving in the North Atlantic

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trade is to monopolize the trade in the hands of the carriers employing the system.

I.

The Shipping Act of 1916 Was Designed to Preserve Independent Competition.

The Shipping Act of 1916 represented an attempt by Congress to permit voluntary conferences of carriers subject to government regulation while at the same time forbidding indulgence by such conferences in coercive practices designed to eliminate independent non-conference competition.

1. *Alexander Committee Recommended and Congress Adopted Ban Against Any Type of Conference Activity Designed to Eliminate Independent Competition.*

A comparison of the report of the Alexander Committee,[17] which conducted the investigation leading to the passage of the Act, with the statutory prohibitions in Section 14 of the Act compels the conclusion that the Committee and the Congress intended to outlaw every type of conference activity that might possess utility for eliminating independent competition. In its discussion of the subject "Meeting the Competition of Lines Outside the Conference," the Committee set forth various methods utilized by conferences to accomplish this purpose:

a) the deferred rebate system (p. 287);
b) collective competition against a single carrier through the use of fighting ships (p. 289);
c) the use of contracts, either jointly or individually by conference members, which provided preferential rates in exchange for the shipper's agreement not to patronize another carrier (p. 290); and

[17] Investigation of Shipping Combinations, House Committee on Merchant Marine and Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess., p. 287.

d) the use of contracts providing preferential rates based on the volume of shipments (p. 291).

The specific practices outlawed as crimes in Section 14 of the Act are patterned precisely, both in substance and sequence, after the Committee's enumeration of devices to eliminate competition:

a) deferred rebates are barred by subsection (1);
b) use of the fighting ship is outlawed in subsection (2);
c) discrimination against a shipper for patronizing a non-conference carrier is prohibited in subsection (3); and
d) unjust discrimination based on volume of shipments is forbidden in subsection (4).

In view of this close correlation between Report and Act, it would appear clear that Congress adopted a scheme of regulation intended to deal with each of the devices which had been presented to the Committee as methods for eliminating non-Conference competition.

This view is confirmed when the Report of the Committee is considered in the context of its time. The two standard techniques for monopolizing ocean carriage prior to World War I were the exclusive patronage deferred rebate system and the fighting ship. Of the deferred rebate, the Alexander Committee observed (p. 287), "Judging from the facts produced in the foregoing pages, this method has proved by far the most effective device for the control of trade." The hearings and report of the Committee were largely pre-occupied with condemning such coercive practices and devising means for outlawing them. As a result of the Committee's deliberations and recommendations, the exclusive patronage deferred rebate and the fighting ship were categorically banned in Subsections 1 and 2 of Section 14 of the Shipping Act of 1916.[18]

[18] In the light of the arguments advanced here to support the dual rate system, it is interesting to note that the Alexander Committee recommended the prohibition of deferred rebates de-

Just prior to the Alexander Committee's investigation, however, the Conferences had become concerned lest the exclusive patronage deferred rebate system be held unlawful in American foreign trade. Consequently, as the Committee noted (p. 288), "in some cases where such rebates formerly existed they have been abandoned". As the deferred rebate system was gradually dropped in our foreign trade,[19] it came to be replaced by simple contracts of carriage.

Because of the novelty of such contracts, only sporadic examples of them were before the Alexander Committee. Even these few samples appear to be informal memoranda which differed widely one from the other,[20] unlike the formal printed instruments employed here.[21] In sharp contradistinction to the contracts involved in this case, each of the agreements before the Alexander Committee was an actual contract of carriage entered into between one or more carriers and a shipper, which imposed upon the carrier (a) a definite obligation to carry, (b) at a rate which could not be increased for the contract period, often one year. In many instances, the total tonnage to be carried was estimated, and the commodities to which the contract was applicable were named, unlike the contracts here which are blanket all-commodity contracts. In no instance did these contracts of carriage impose a penalty of double freight in the event of breach by the shipper, nor did they hold out the further penalty of automatic application of

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spite the fact that it found (p. 288), "the deferred rebate systems now in use are equally open to all shippers who agree to give exclusive patronage, and are granted without discrimination as regards the size of individual or total shipments."

[19] It was never abandoned in other trades and is still, today, the favorite monopolistic device around the world in trades which do not touch American shores (R. 314).

[20] See examples in Appendix B to this Brief.

[21] The Record reflects that the same printed form was used uniformly not only in this trade, but in all Trans-Atlantic Trades (R. 874-875).

higher non-contract rates, as do the dual rate contracts here.[22]

Because such actual contracts of carriage imposed a heavy obligation on the carrier to carry the proffered tonnage at a fixed rate, they were necessarily of limited utility. In a calling where charter rates vary widely with the supply of cargo and bottoms available, it would be inviting bankruptcy for any carrier or group of carriers to contract in advance to carry the entire tonnage moving in a trade for any length of time at a fixed rate. Such a burden in effect tends to operate as an automatic limit on the spread of such exclusive contracts because good business judgment militates against carriers obligating themselves to carry goods beyond their capacity or at rates which could prove uneconomic. Such considerations could very well explain why Congress felt no necessity to outlaw in *haec verba*

[22] Occasionally in the 30's Isbrandsten employed simple memoranda contracts of carriage of this nature to fight conference exclusive arrangements. Isbrandtsen discovered that after reducing an existing "paper" rate to enable some shipper to engage in trade, the Conference would steal the fruits of Isbrandtsen's enterprise by granting the shipper a similar rate and tying him up with an exclusive contract (R. 441-442). To protect itself, appellee in a few instances asked the shipper to "confirm" that in consideration of an actual productive rate, appellee would receive his business. Thereafter, this reduced rate was available to all other shippers, regardless of patronage. As Mr. Crinkley testified (R. 422):

> Now, we established this special rate, and this man assures us of his business. Sooner or later some other company is going to want to ship also, and there is a lot of digging around about that fact. We establish this rate, and then anybody—anybody that comes along shipping that commodity gets that rate. There is no question about it—there cannot be. We have been in business about 21 or 22 years. I have been with the company 19 years. And as an independent carrier, there has been no time that anybody to my knowledge has ever brought any complaint, directly or indirectly, that we have been charging different rates to different shippers on the same commodity and in the same trade. The Maritime Commission has never had any complaint to that extent. I have never had any complaint made to me.

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exclusive contracts of carriage in the same manner as it had outlawed deferred rebates and fighting ships.[23]

It remained for a later generation of carrier interests to circumvent the prohibition against the exclusive patronage deferred rebate system by perfecting the present exclusive patronage contract system as a coercive device for forcing a shipper to cease patronizing independent carriage. As the Board, itself, characterized this development (R. 64), "the dual rate system is the device which has been developed for that purpose", i.e., to achieve "something more than voluntary shipper cooperation".

In any case, the nature of the contracts of carriage before the Alexander Committee rendered them easily distinguishable from the pure monopolistic instruments before this Court. But even as to such *bona fide* contracts of carriage, *not one word of approbation* appears on the face of the Alexander Committee's Report. And appellants have been driven to seeking support in the Committee's remark (P. 307), "It is *argued* that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system" (emphasis supplied). There is no evidence that the Committee took any stock in such an argument even as applied to the simple contracts of carriage before it. As applied to the formidable dual rate system before this Court, such an argument is completely unfounded.

If the exclusive patronage contract system accomplishes its admitted purpose to eliminate independent competition, it manifestly renders the shipper utterly dependent upon the conferences for as long as the system functions. And such continued dependence would seem to be contemplated by the contracts themselves. As the Board characterized the term of these agreements (R. 56): "The agreements

[23] Of course, absent the invidious features of the system involved here, full requirements contracts may have legitimate utility in foreign trade as in other fields. *Cf. Standard Oil of Cal.* v. *United States*, 337 U. S. 293, 306 (1949).

shall continue in effect throughout consecutive subsequent years subject to the right of either the shipper or the carrier to terminate it as of December 31 in any year by giving the other party 90 days' written notice of termination". "But", as the court below noted (R. 128) "the very purpose of the dual rate provisions is, if possible, to compel independent shippers (sic: carriers) to join the conference or go out of business. If, then, the dual rate system provision is successful, there will be no independent carriers". Absent independent carriage in the trade, the "right" of the shipper to cancel is completely lacking in substance.

Furthermore, because the exclusive patronage dual rate system holds out to the shipper the promise of an advance discount, its impact upon the trade is more immediate than that of the deferred rebate. Many a small shipper finds a discount in hand worth two in the future. Consequently, the effect of the exclusive patronage contract system in foreclosing the market to the independent carrier is, if anything, more devasting than the impact of the deferred rebate, and the result of its successful functioning is to leave the shipper, if possible, more dependent on the conferences.

Thus, even if Congress had done no more in the Shipping Act of 1916 than outlaw the exclusive patronage deferred rebate system, its modern counterpart, the exclusive patronage dual rate system, would enjoy a very dubious legitimacy. On the record here, the difference between the exclusive patronage deferred rebate and the exclusive patronage contract system is largely a difference between a deferred rebate and a preferred rebate. As this Court recognized in *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 307 (1937), the operation of the exclusive patronage contract system "does not differ substantially from that of 'deferred rebates' ".

Forearmed with knowledge of man's inventive genius, however, Congress did not rest content with simply outlawing explicitly the two practices which bulked large in

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its consciousness in 1916 and trusting to judicial alertness to outlaw similar practices by implication. It went further and outlawed every other method that might conceivably be devised to penalize a shipper for patronizing any other carrier. After the notable example of the successful statutory attempt to outlaw restraints of every type and kind in the Sherman Act,[24] Congress, in the first two subsections of Section 14 of the Shipping Act of 1916, forbade the known means of monopolizing trade, the fighting ship and the deferred rebate, and in the third subsection sought to insure the effectiveness of these prohibitions by banning any other attempts to reach the same end, even though such attempts might not have been wholly embraced in subsections 1 and 2. In subsection 3, the Congress provided that:

> No common carrier by water shall, directly or indirectly * * *
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Under this subsection, the Congress sought to outlaw every attempt to penalize a shipper for patronizing an independent carrier. While the dual-rate system had not

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[24] *Cf. United States* v. *Standard Oil*, 221 U. S. 1, 61 (1911) where this Court harmonized Sections 1 and 2 of the Sherman Act in the following terms:

> In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about be not embraced within the general enumeration of the first section.

in 1916 matured to the point where experience revealed to Congress its identity with the deferred rebate system, nevertheless in the blanket prohibition in Subsection 3 against every form of retaliatory discrimination, the Congress sought to reach every adaptation of the deferred rebate designed to produce the same result. And insofar as the "ordinary" contracts of carriage before the Alexander Committee alerted it to their possible future use as a subterfuge to escape the ban against deferred rebates, the Congressional history reveals that Section 14(3) was drafted to prevent the metamorphosis of such "ordinary" contracts of carriage into the monopolistic devices before this Court.

Of course, the Committee could not interdict every "ordinary contract of carriage" because every bill of lading is a contract of carriage, and, as we have seen, the contracts employed prior to 1914 had not risen to the indignity of the modern exclusive patronage dual rate system. The lack of an invidious label to pinpoint the object of its solicitude did not, however, make the Congressional interest any less keen or its intent any less clear: in Section 14(3) it sought to reach every discriminatory device, contract or otherwise, designed to retaliate against a shipper for patronizing any other carrier or for any other reason. In fact, if the reference in the section to retaliation by "resort to other discrimintatory or unfair methods" is not to be disregarded as surplusage, it must necessarily be read as covering practices not prohibited by name. No other view is consistent with the remarkable correlation between the four types of devices considered by the Committee under the caption "Meeting the Competition of Lines Outside the Conference" and the four types of devices banned by Congress in Section 14.

Thus, in Section 14, read in its entirety, the Congress embodied a mandate to its administrative agents to preserve independent non-conference carriage against each and every device that might be employed by a conference

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to eliminate such competition. In short, the Congressional scheme contemplated the establishment of voluntary conference arrangements, but absolutely forbade the conversion of such voluntary agreements into involuntary ones through the use of coercive devices with the purpose and effect of eliminating independent non-conference competition.

2. *Ban Against Elimination of Non-Conference Competition Required by Regulatory Scheme.*

This legislative and administrative scheme was required by the facts. For a host of reasons Congress deliberately abandoned the attempt to impose upon ocean trade the same discipline of detailed government regulation that it had adopted for common carriers in the domestic field. The Alexander Report (pp. 420-421) had recommended that the Interstate Commerce Commission be authorized to investigate the rates of all carriers, including those in foreign commerce, and to order their "rates changed if convinced that the rate under consideration is unreasonably high". The Report explained this recommendation by saying that "the Committee feels that in the absence of government control steamship combinations may in many instances have it within their power to arbitrarily raise rates to an unreasonable degree both as regards the general level and in the case of particular commodities * * *. (The) purpose of the law should be to protect the shipper against any unreasonably high rate which the combination lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of government supervision and control." Congress partly accepted this recommendation in Sec. 817, by there giving the original Shipping Board the express power to order just and reasonable maximum rates with respect to interstate water-carriers. But Congress omitted any such provision as to carriers in foreign commerce; as

to such carriers, there is only the statutory power to forbid discrimination in rates.

On the face of the Shipping Act, Congress thus endowed the administrative agents with no authority to pass upon the reasonableness of rates. Unlike the practice under the Interstate Commerce Act, regulation under the Shipping Act requires only that rates on cargo outbound from the United States shall be filed with the Board within 30 days *after the effective date thereof*.[25] While the Board has from time to time contended for an implied power under Section 15 to regulate the reasonableness of conference rates, "there are no decisions of the Board or its predecessors which imposed maximum rates on conference carriers engaged in foreign commerce".[26] Failing to place plenary rate powers in the hands of its administrative agents, the solicitude of Congress to protect the continued existence of independent non-conference competition is understandable. That Congress' purpose in this respect has been largely fulfilled is confirmed by the Examiner, who found that down through the years Isbrandtsen "has effectively acted as a check on respondents' [Conferences] rates and services" (R. 261).

Approval of the exclusive patronage contract system would thus eliminate the last effective independent check on conference rates and services without any substitute therefor in the Congressional scheme of regulation. Such a result would do violence to all our traditional notions of business morality. As Judge Frank commented in his appendix to the decision below (R. 138):

> Competition is cherished by the common law (and safeguarded by the anti-trust laws) in large part for the purpose of protecting consumers from unreasonably high prices or rates likely to result from monopoly or unreasonable restraint of trade. Therefore,

[25] 46 C. F. R. 235.1, 235.2; no similar requirement applies to inbound cargo.

[26] Letter of Board to Court below (R. 144).

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> whenever any of our governments has, by statute, insulated anyone from all competition in the same industry—as, for example, by a grant of an exclusive franchise—it has coupled the grant with the establishment —as a substitute for competition as a price-regulator— of a governmental agency empowered to fix reasonable maximum prices or rates. A legally sanctioned complete monopoly, minus such regulation, is virtually unprecedented.

The most recent Congressional solution of the thorny problem posed by the attempt to regulate monopolies merely confirms this view. In adopting the Bulwinkle Bill (49 U. S. C. § 5b), which authorized regulated rate conferences of domestic common carriers, the Congress specifically prohibited the employment of coercive devices by such conferences by forbidding the Interstate Commerce Commission to approve any agreement which did not preserve to each party "the free and unrestrained right to take independent action" at any time. The Bulwinkle Bill merely represents the latest declaration by Congress that coercive activities by private groups will not be countenanced—even in a field of regulation where the activities of those groups is supervised by administrative authority in the most minute detail. It is a singular argument, indeed, that would suggest that Congress would approve such coercive activity in a field where the supervisory powers of the public regulatory body are as limited as those of the Board under the Shipping Act. A decent respect for the history of the legislative process in these matters, as well as for the explicit statutory language of Section 14, compels the conclusion that the Shipping Act of 1916 was purposely designed by Congress to preserve non-conference competition. As James F. Byrnes, a member of the Alexander Committee, characterized the purpose of the Act during the debates on the floor:[27]

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[27] 64 Cong. Rec. 8057.

> The regulatory features of this bill are agreed to by all fair-minded men. They are designed simply to enable an independent ship-owner to carry on his business, without having the shipping trust drive him out by discriminatory or unfair practices.

It is incredible to suppose, as appellants argue, that Congress should go to extremes in condemning deferred rebates and fighting ships and at the same time authorize an even more subtle and effective monopolistic weapon in the form of the exclusive patronage dual rate system. As this Court remarked in *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 307:

> The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly.

II.

The Exclusive Patronage Contract System Retaliates Against a Shipper for Patronizing Other Carriers.

It is almost a work of pure supererogation to argue the application to the facts of this case of the Shipping Act's express prohibition against retaliation or resort to discriminatory methods against a shipper "because such shipper has patronized any other carrier." Because the system, under examination here, proposed on and after November 1, 1948 to impose an arbitrary 20 percent increase in rates upon any shipper who continued after that date to patronize a non-conference line, the proposed system clearly undertook to impose a retaliatory discrimination against such shipper for patronizing a non-conference carrier.

The sole function of the dual rate system is to prevent shippers who would otherwise patronize Isbrandtsen from doing so. While the Board has conjured up a mythical shipper, unnamed by the Board and unidentified in the record, who would refuse to contract while continuing to deal

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with the Conference lines exclusively, the dual rate system is plainly devised to deal with those shippers whom experience has shown would deal with Isbrandtsen if allowed a free choice of carriage. As to such shippers, the mere establishment of the system would have been retaliation for their past independence. The system is further designed to hold them in line thereafter by threatening them with retaliation if they again patronize Isbrandtsen and by actually retaliating against them if they do. Thus, a shipper who has been induced to sign a contract is on notice that if he patronizes an independent he will thereafter be subjected to the higher rate.[28] The subsequent exaction of the higher rate from a shipper who breaches his contract can only be regarded as retaliation for patronizing another carrier.[29]

Moreover, the system not only retaliates against a shipper for patronizing an independent; it undertakes to punish the shipper who even contemplates the possibility of patronizing such a carrier. By undertaking actually to impose a substantially increased rate on shippers who refuse to agree not to patronize Isbrandtsen, the system practices a clear retaliation for their act of independence. And since this act of independence consists only of the shippers' insistence upon their right to deal with an independent, retaliation for such insistence is clearly retaliation under a statute which prohibits carriers from "*directly or indi-*

[28] And it should be remembered that the Board made such retaliation mandatory (*supra*, p. 12).

[29] The Examiner sought to escape the dilemma posed by the shipper who is compelled to pay the higher non-contract rate as a consequence of breaching his contract, by suggesting that such subsequent imposition of the higher rate was merely a penalty for breach of contract (R. 217). The appellee, however, pointed out that the contract provided its own penalty for breach, namely, twice the freight that would have been paid under the contract, and that such double freight penalty could not be construed as "liquidated damages" for breach, if other penalties were lurking about in the system. Thereupon, the Examiner dropped the argument and the Board did not mention it.

rectly" retaliating against a shipper for patronizing any other carrier.

The Board sought to escape the force of the statutory prohibition by resort to a sheer verbalization: that the higher rate was charged for refusal to sign a contract, rather than as retaliation for "patronizing any other carrier." The Board could scarcely be serious in suggesting that the Conferences regard the mere signing of the exclusive contracts as significant. Of course, the Conference members are not interested in a mere paper transaction—they are concerned only in preventing shippers from patronizing their non-Conference competitors. In essence, the argument comes down to this: The Conferences do not charge a shipper the higher rate because he deals with a competitor; they simply charge the higher rate because he will not agree to deal with them exclusively. It is a sufficient response to this contention to refer to the Act itself, which not only prohibits retaliation because the shipper deals with another carrier, but prohibits as well retaliation "*for any other reason.*"

The argument of the Board scarcely merits more consideration here than did a similar argument advanced to this Court in *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 135 (1936). There the defendant contended that it had not violated the Clayton Act's prohibition against leasing machines on the condition that the lessee "not deal in the goods of a competitor" because it only leased its machines on the simple condition that the lessee purchase all of his requirements from the defendants. In dismissing such a contention, this Court observed:

> Little need be said of the contention that the condition of appellant's leases does not infringe these prohibitions. It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards

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precludes the use of the cards of any competitor, the condition operates in the manner forbidden by the statute.

If it be assumed, as the Board suggested (R. 61-62), that in Section 14(3) Congress meant to codify the common law set forth in *Menacho* v. *Ward*, 27 Fed. 529, 533 (C. C. N. Y., 1886), the Board's position becomes completely indefensible, for in the *Menacho* case the Circuit Court held:

> The proposition is speciously put that the carrier may reasonably discriminate two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. * * *
>
> The vice of discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly, it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious.

The Board purported to take some comfort from the fact that in the *Menacho* case, the Circuit Court further observed:

> The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the

whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for services actually rendered to him or them. Such a consideration might be influential in inducing parties to contract in advance; but it has no legitimate bearing upon the value of services rendered without a special contract, or which are rendered because the law requires them to be rendered for a fair remuneration.

The Board emphasized the phrase "*such a contract might be influential in inducing parties to contract in advance*" and construed it as an acknowledgment by the Court of the lawfulness of the dual rate system However, the Board ignored the phrase "*or which are rendered because the law requires them to be rendered for a fair remuneration*". It would seem clear that the Circuit Court was distinguishing between private commercial dealings and those pertaining to common carriers whose obligation it is to serve all comers equally. This view is confirmed by the context in which the Circuit Court made the observation relied on by the Board. Immediately following the section of the opinion quoted by the Board, the Court remarked:

> A common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself," Nelson, J., in *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344. His obligation and liabilities are not dependent upon contract, though they may be modified and limited by contract. * * * It is upon this foundation, and not alone because the business of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to

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> serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation.

The *Menacho* case manifestly stands for the proposition for which the Board's predecessor, the Shipping Board, cited it in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922) in construing Sections 16 and 17 of the Shipping Act of 1916: " the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers who receive a similar transportation service."[30]

In sum, it is difficult to believe that rational beings could differ as to whether the charging of a higher rate for similar transportation service against a shipper who continues to deal with a non-conference carrier violates the policy of the Act to prevent retaliation against a shipper for patronizing such independent carrier. ". . . there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose . . ." (*Kordel* v. *U. S.*, 335 U. S. 345, 349 (1948).

III.

The Exclusive Patronage Contract System Is a Discriminatory Method Designed to Retaliate Against a Shipper for Patronizing Another Carrier.

It is conceded that the exclusive patronage dual rate system establishes different rates for identical transportation

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[30] The *Menacho* case has had a variable experience before the Board and its predecessors. As noted, the *Eden* case relied upon it for the proposition that the dual rate system was unlawful; in *Pacific Coast European Conference*, 3 USMC 11 (1947), the Commission treated the *Menacho* case as having been made irrelevant by the statute; and, in the instant case, it is cited by the Board as authority for the proposition that the dual rate system is lawful.

services. That such a system discriminates against the non-contract shipper who is charged a higher rate is scarcely open to argument. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 581 (1947). As this Court recently observed in *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 227 (1951):

> In the Mechling case, the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. This was a plain case of discrimination. There were different rates provided for equal service without any showing that any additional service was rendered for the additional charge.

Furthermore, the precise type of differential involved here was held in *Swayne & Hoyt* v. *United States*, *supra*,[31] to be "prima facie discriminatory since the two rates were charged for identical services and facilities."

This was the precise issue tendered by respondent to the Board. As the Board observed (R. 56):

> The gist of Isbrandtsen's argument is that the system violates statutory provisions in that it sets up dual rates for the same service and thereby necessarily creates *discrimination* between those shippers who sign and those who refuse. Isbrandtsen claims that it makes no difference that such discrimination may not be *unreasonable* or *unjust*, contrary to the requirements of sections 15, 16, and 17 of the Act. It points out that the language of Section 14(3) of the Act, unlike that of the other sections referred to, outlaws not only *unreasonable* discrimination but *all* discrimination. Relying on dicta of the Supreme Court in *Swayne & Hoyt, Ltd.*

[31] Because the *Swayne & Hoyt* case involved an administrative holding that the dual rate system was unreasonably discriminatory in violation of Section 16 of the Act, this Court could not rest in that case on a holding that the system was discriminatory but was compelled to go further and hold it unreasonably so. A lesser burden is obviously involved here under 14(3) which forbids any discrimination which retaliates against a shipper for patronizing another carrier.

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> v. *U. S.*, 300 U. S. 297, complainant concludes that a prima facie case of discrimination has been made out, which may not be excused on any showing of reasonableness.

This was a correct statement of the contentions of appellee. However, instead of deciding whether the exclusive patronage contract system was discriminatory, in violation of Section 14, sub-section 3, as distinguished from Sections 16 and 17, the Board actually decided, in effect, that the system did not violate Sections 16 and 17. This the Board accomplished by the simple expedient of importing the qualifying adverb "unduly" from Sections 16 and 17 and insinuating it into Section 14(3)—*an unwarranted qualification which Congress specifically omitted from Section 14(3) at the time of its enactment.*

The fact is that, in this very respect, Congress significantly deviated from the Alexander Report's recommendations. The Report (p. 421) recommended that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason". This recommendation was before the Committees which, in the next session, brought out the bill which became the 1916 Act.[32] But the bill and the Act importantly departed from the recommendation of the Alexander Report. Section 814(3) substituted for the recommended words "other unfair methods of discrimination" the words "other discriminating or unfair methods". And confirming the fact that this alteration was not inadvertent, this change in language was concomitant with another important deviation from the Alexander Report. In its fourth recommendation to Congress, the Committee had advised:

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[32] See SEN. REP. No. 689, 64th Cong., 1st Sess., 10-11.

> In this connection, it is the belief of the Committee that water carriers should be required to charge equal rates to all shippers irrespective of the volume of freight offered for shipment.

In short, the Committee omitted from its fourth recommendation the reasonableness concept imported by the words "undue" and "unjust", and recommended the prohibition of any inequality of rates. However, the bill which was introduced and enacted by Congress significantly departed from this advice by incorporating the reasonableness concept into Section 14(4):

> Fourth. (No carrier) shall make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper.

In this fashion, Congress made the prohibition against discrimination in 14(3) peremptory but required that the discrimination in 14(4) be unjust, in both cases contrary to the recommendation of the Alexander Report—thus demonstrating that it knowingly and deliberately deleted "unfair" in Section 14(3). In the face of this clear-cut expression of Congressional intent, the Board's reinsertion in Section 14(3) of the qualification which Congress omitted represented a usurpation by the Board of legislative authority.

Of course, the distinction between discrimination and undue or unjust discrimination is a familiar one in the field of common carrier regulation. *Hocking Valley* v. *United States*, 210 Fed. 735 (6th Cir., 1914), cert. den. 234 U. S. 757 (1919); *Baltimore & Ohio R. Co.* v. *United States*, 22 F. Supp. 533, 538 N. D. N. Y. (1937); *State of New York* v. *United States*, 331 U. S. 284 (1947). As Judge Learned Hand, speaking for a three-judge statutory court, observed in the *Baltimore & Ohio* case, *supra*, which involved a similar distinction under the Interstate Commerce Act:

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> Subdivision 1, as amended, 49 U.S.C.A. § 3(1), generally forbids a carrier to discriminate unduly or unreasonably in any way between one person, "locality, port, port district, gateway, transit point" and another. It does not, and could not, impose a peremptory prohibition in such cases; the discrimination must be "undue or unreasonable"; discriminations are not per se unlawful, their occasion must be examined. That is not true of discriminations under subdivision three, which is peremptory, and admits no excuses; carriers must not discriminate in rates between connecting lines.

The Board sought to justify this unwarranted tampering with the statutory language by suggesting that such a Board amendment of the statute was "possibly" in the interest of harmonizing 14(3) with the language in other sections of the statute (R. 60). But the Board achieved such harmony only at the cost of reading 14(3) completely out of the Act. If the discrimination is undue under Sections 16 or 17, nothing is added by the fact that it is also retaliatory under Section 14. The only way Section 14(3) can be accorded independent vitality in harmony with the other sections of the Act is to read it as Congress wrote it—to prohibit any retaliatory discrimination whatsoever against a shipper for patronizing another carrier or for any other reason. Thus read, the section engenders no conflict with Sections 15, 16 or 17 of the Act, each of which were designed to incorporate the ordinary regulatory provisions against unjust or undue preference or prejudice between shippers, ports and localities.

To read the Act as the Board suggested would be to rob Section 14(3) of all meaning in violation of the familiar canon of construction that no clause of an Act can be presumed to be without effect. *Marbury* v. *Madison*, 5 U. S. 137 (1803). To convert the peremptory prohibition in 14(3) into the qualified prohibitions in 15, 16 and 17, is flatly to ignore the clearly expressed Congressional prohibition against retaliatory discrimination of every type

and kind and to attempt to shelter behind administrative expertise a flatly forbidden discrimination. *Interstate Commerce Commission* v. *Mechling, supra.* To read the Act as Congress wrote it permits the Shipping Act of 1916 to remain as a harmonious whole. More importantly, such an interpretation of the Act permits the ready effectuation of the Congressional policy, to protect independent carriage by outlawing all relatiatory discriminations against shippers seeking to patronize such carriage.

But even if the Board's reconstruction of Section 14(3) be accepted and the Section be interpreted as prohibiting only retaliation which is unjustly discriminatory, the Board's position is scarcely improved. For then the Board is faced with the question that troubled the court below: how can a dual rate system constructed by means of an arbitrary differential be just or reasonable in any circumstances. The only permissible answer is the one supplied by the Chairman of the very Conferences responsible for the dual rate system involved here (R. 861):

> I do not think the making of rates by differential is a proper basis, for that is an arbitrary basis.

IV.

Congress Left the Commission No Discretion to Approve a Dual Rate System Which Works a Retaliatory Discrimination Against a Shipper for Patronizing Another Carrier.

While the Board sought support for its position in reliance on the decisions of its predecessors, those decisions, as the Court below noted (R. 130) "have lacked uniformity and consistency." Of the seven decisions in which the Board and its predecessors dealt principally with the lawfulness of the dual rate system,[33] four have held the system unlawful.

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[33] As distinguished from several other decisions where the lawfulness of the system was only ancillary to the right of a complaining carrier to gain admission to the Conference.

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The first case to consider the question was *Eden Mining Co.* v. *Bluefield's Fruit, supra,* decided in 1922, at a time when the Board's predecessors were considerably closer than the present Board to the Congressional response to the public indignation which led to the passage of the Shipping Act of 1916. In the *Eden* case, the Shipping Board held:

> It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially and we think the language used in W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon differences of service must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination." From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical.
>
> It is suggested on behalf of the carrier that as the complainants were extended full opportunity to avail themselves of the lower rates by agreeing to the same condition which contract shippers had accepted, they were accorded the substantial equality of treatment contemplated by sections 16 and 17 of the Act. This contention, however, is as unconvincing here as when used in support of other kinds of unjust discrimination resulting from unfair conditions imposed by carriers upon shippers. Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right at-

> tached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

The Shipping Board's condemnation of the exclusive patronage contract system in the *Eden* case was followed by the Shipping Board Bureau in *Intercoastal Investigation*, 1 U.S.S.B.B. 400 (1935), where it was held:

> An underlying purpose of the Shipping Act, 1916, is to prevent every form of favoritism based upon the relations of the shipper with the carrier as a customer and to place all shippers, the large and small, the steady and occasional, upon a plane of equality in the right to service. For this reason that Act condemns and makes unlawful every regulation, device, or subterfuge which undertakes to give to anyone an advantage based upon conditions other than those inhering in the transportation itself and alone. *Contracts of the character in question do not constitute a transportation condition as to warrant a difference in transportation rates.*
>
> The prohibition of discrimination means, among other things, that no difference or distinction shall be made in rates that coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business which under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor.

To the same effect as the holding in the *Intercoastal Investigation* was the decision of the same Bureau in *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524, which was affirmed by this Court *sub nom Swayne & Hoyt*, *supra*.

Relying on the decisions of its predecessors set forth above, the Commission in *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939), again held that the contract rate system in foreign commerce was unlawful:

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> Since they carry more than 80 percent of the traffic from the Great Lakes area, it is obvious that respondents, for all practical purposes, have a monopoly. *A difference in rates for identical services based solely upon whether or not the carrier secures the shipper's entire patronage is prima facie discriminatory.* (Emphasis supplied.)

As the *Contract Routing* case demonstrated, the criterion employed by the Board's predecessors in outlawing the exclusive patronage contract system has been, not the nature of the commerce, whether foreign or intercoastal, but the *monopolistic* nature of the system. If, as the Commission held in the *Contract Routing Restrictions* case, "*a difference in rates for identical services based solely upon whether or not the carrier secures the shipper's entire patronage is prima facie discriminatory,*" then the exclusive patronage contract system is necessraily discriminatory, and in violation of Section 14 of the Act.

With scarcely more than a passing nod at the four clear-cut holdings by its predecessors against the exclusive patronage contract system (R. 59), the Board singled out for emphasis two other decisions, *Rawleigh* v. *Stoomvaart, et al.*, 1 U.S.S.B.B. 285 (1933) and *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948), which held the dual rate system lawful. In fact, the Board substantially adopted the rationalization of the *Pacific Coast* case as a basis for its decision here (R. 57, 58).

Whatever the respective merits of these contradictory holdings by the Board's predecessors may be, they at least establish such an inconsistent course of administrative action as to render the administrative interpretations of little weight here. *American Surety* v. *Bethlehem Bank*, 314 U. S. 314, 319 (1941); *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 280 (1929).

However, even if the course of administrative interpretation had been completely unambiguous, uniform, and consistent in its support of the dual rate system, the decision of the Board here could not stand in the teeth of the clear

statutory proscription of retaliation through the use of discriminatory methods against a shipper for patronizing another carrier. *United States* v. *Missouri Pacific R. Co., supra; Neuberger* v. *Commissioner,* 311 U. S. 83, 89 (1940); *Mitchell* v. *United States,* 313 U. S. 80, 97 (1941). As this Court, speaking through Mr. Chief Justice Hughes, observed in the *Mitchell* case, *supra:*

> On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

As noted above, the determinative facts are largely admitted on the record, and accordingly there is no factual issue here on which this Court might feel bound by the administrative judgment as was the case in *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344 (1940). In this case, we have a dual rate system which can have no conceivable function except to force shippers to use conference lines instead of independent carriers. There may be reasonable differences of opinion as to the wisdom of such a policy, but not as to the certainty of its result; and Congress, as noted above, has made the policy judgment and has flatly forbidden the Board to do what it has done. Here the situation is analogous to *Mitchell* v. *United States, supra,* where another administrative body sought to shelter a flatly forbidden discrimination behind the cloak of expertise. There, as here, the Court was referred to *United States* v. *Chicago Heights, supra,* and a host of other decisions upholding the right of administrative agencies to make factual judgments. But, as noted above, this Court answered that no administrative or expert judgment could serve to justify a discrimination forbidden by the Act. And such, it is submitted, must be the answer of the Court here.

CONCLUSION.

Since 1931, Isbrandtsen has been engaged in plying the North Atlantic trade routes as an independent common carrier. During the entire period, Isbrandtsen has been engaged in fair and open competition with the Conference lines, and the shipping public has been well served by the presence in the trade of this independent check on conference rates and services. In the light of this history, it would seem rather late in the day for the Conferences to come forward with the suggestion that it is in the interest of an independent American Merchant Marine for a foreign-flag dominated conference to be endowed with power to deny an American flag carrier equal access to American shippers—and this in the teeth of the Shipping Act of 1916, in which Congress embodied a policy designed to preserve independent non-Conference carriage. To effectuate this policy, as well as to preserve the benefits of independent competition for the shipping public, this Court should affirm the judgment of the District Court.

Respectfully submitted,

JOHN J. O'CONNOR
Washington Building
Washington 5, D. C.

WILLIAM L. MCGOVERN
1200 Eighteenth Street, N. W.
Washington 6, D. C.
Counsel for Appellee

ARNOLD, FORTAS & PORTER
1200 Eighteenth Street, N. W.
Washington 6, D. C.
Of Counsel

January 21, 1952.

APPENDIX A.

North Atlantic Baltic Freight Conference
North Atlantic Continental Freight Conference
North Atlantic French Atlantic Freight Conference
North Atlantic U. K. Freight Conference

80 Broad Street
New York 4, N. Y.

Telephone Whitehall 4-0990 Cable Tranconfer

October 1, 1948

To Merchant Shippers:

Gentlemen:

Enclosed please find, for your prompt acceptance, offer of contracts for the period November 1, 1948 to December 31, 1949.

It is important that advice of acceptance of these contracts is in the hands of the Carriers promptly. This will avoid application of the higher non-contract rates of the Carriers tariff and to accomplish this we therefore urge that you sign and return the enclosed forms to us by return mail. *Please sign and return all copies and do not remove any classifications that may be attached.* We will promptly execute and return one complete copy of each contract for your files.

If you have ceased exporting to the ports covered by these contracts or do not desire to sign them kindly return the forms to us with your advices so as to clear our records.

If the name of firm or address appearing in the contract is not correct, please correct same before returning the forms.

Very truly yours, (S.) C. R. Andrews, Chairman.

[fol. 31] North Atlantic Continental Freight Conference
80 Broad Street, New York 4, N. Y.

The Canadian Continental Eastbound Freight Conference
315 St. Sacrement Street, Montreal 1, Canada

Memorandum of Agreement, made this — day of —, 19— between — —, hereinafter called the Merchant ("Merchant" includes subsidiaries, affiliates and agents of any of them), and the several Steamship Lines named below

members of the North Atlantic Continental Freight Conference and The Canadian Continental Eastbound Freight Conference, hereinafter called the Carriers. It is understood and agreed that if any additional Line or Lines become members of the North Atlantic Continental Freight Conference or the The Canadian Continental Eastbound Freight Conference, respectively, such Line or Lines shall thereby and thereupon become parties to this agreement as Carriers, and the Merchant shall have the right to ship on such Line or Lines to the same extent as on the other Carriers and should any Line or Lines cease to be Members of said Conferences, they shall simultaneously cease to be Carriers hereunder and this agreement shall thereupon terminate and expire as between the Merchant and such Line or Lines, but shall continue in full force and effect according to its terms as between the Merchant and the Lines still remaining Members of said Conferences.

1. In consideration of the rates and other conditions stated herein, the Merchant agrees to offer or cause to be offered to the Carriers for transportation by them to Belgium, Germany and Holland and discharge at such ports of said countries served by the Carriers as may be designated by the Merchant, all shipments of the commodities mentioned (or provided) below.

2. This contract covers all export shipments of the Merchant of the herein named (or provided for) commodities moving out of United States North Atlantic and Canadian ports to or through ports of the aforesaid countries, and all said shipments shall be tendered to the Carriers for their vessels which may load at the ports of Norfolk, Newport News, Baltimore, Philadelphia, New York, Boston, Portland and Canadian ports Montreal and East thereof and scheduled to sail to the port of destination designated by the Merchant, and failure so to tender any such shipments to the Carriers or shipment of them by vessels other than those of the Carriers shall be a violation of this contract. The Carriers agree, subject to provisions hereof, to transport said shipments on their vessels sailing to the aforesaid countries.

3. The Merchant has the option of selecting any of the vessels operated by the respective Carriers to the countries herein mentioned subject to agreement with the particular

Carrier as to the quantity, but it is the spirit of this agreement that the Merchant, so far as convenient to him, will distribute shipments equitably between the several Carriers. The Merchant agrees to make application for space as early as practicable before the vessel's advertised sailing date. If the Carriers fail to name space within three business days after the Merchant duly applies therefor, on a vessel scheduled to sail from the port of shipment selected within fifteen days after the seaboard clearance date desired, the Merchant shall be free with respect to such shipment to secure space elsewhere without prejudice to his right to future shipment under this agreement but before making such arrangement the Merchant shall first give the office of the Conference an opportunity to arrange space.

4. The Carriers severally agree to furnish the Merchant at the rate or rates named or provided for herein space in such vessels as they may respectively load at said loading ports for transportation and discharge at the ports desired, provided that suitable unbooked space is available therein when the Merchant makes application. If the Merchant shall make shipment hereunder for the benefit of some party not holding or conforming to a similar agreement, or shall make shipment in violation hereof, then the Carriers shall have the option at any time to declare this agreement terminated, and the Merchant shall be liable to the Carriers for liquidated damages equal to twice the amount of freight that would have been payable under this contract in respect of the shipment constituting the violation. The Merchant [fol. 32] agrees to furnish to the Carriers, through the office of the Conference, full information concerning propriety of any shipment made or not made by the Merchant under the agreement and failure to furnish such information promptly after request shall entitle the Carriers to cancel this agreement on ten days' written notice.

5. The commodities and the rates thereon to which this agreement applies are:

As per Reverse Side or Attached

Other commodities as may be shipped by the Merchant from time to time, which shall be deemed covered by this agreement, at the lowest rates then in effect for the particular commodity.

The minimum charge on any one bill of lading or per package shall conform to the Carriers' charges in connection with the particular commodity in effect at time of shipment.

Unless otherwise specifically stated herein packages or pieces exceeding 4480 pounds or 30 feet in length will take the additional Heavy Lift Charges and Extra Length Charges in effect at time shipments are made.

Rates quoted herein are in United States currency on shipments originating in United States moving either through United States Ports or through Canadian Ports, and are in Canadian currency on shipments originating in Canada, moving either through Canadian Ports or through United States Ports.

The rates herein specified are subject to be increased reasonably from time to time. Any notice of increase shall be deemed accepted by the Merchant unless within 20 days after his receipt of the notice of increase he gives the Carriers written notice of non-acceptance. In event of such non-acceptance the Carriers shall have the option at any time within 20 days after receipt of the Merchant's notice to cancel this agreement on giving the Merchant at least 60 days written notice, but if such notice is not given this agreement shall remain in effect.

The Carriers have the option to reduce their rates, and should they during the term of this agreement reduce their rates on the commodities herein named (or provided for) below the rates herein agreed, the Merchant, under like conditions, shall be given the full benefit of such reduced rates during the period same remain in effect.

6. Shipments are subject to all the provisions of the permit dock receipt, and bill of lading in use by the Carrier when shipment is tendered. If valuation higher than that provided by the regular form of bill of lading is desired by the Merchant it must be declared before shipment and, in accordance with tariff provisions, a higher rate paid than stated in this agreement.

7. In case of dispute under this agreement the Merchant and Carrier(s) each agree to submit the matter to arbitration at New York, or Montreal if the Merchant is domiciled in Canada, each appointing an arbitrator and the two so chosen shall select an umpire to which arbitration committee

all data requested in connection with the matter in dispute shall be made available. Decision of two or more members of said Committee shall be binding on the parties.

8. This agreement shall cover shipments as above specified on vessels scheduled to sail from port at which shipment is loaded during the period from November 1, 1948, to December 31, 1949, both dates inclusive and shall continue in effect on the same terms and conditions throughout consecutive subsequent years, subject to the right of either the Merchant or the Carriers to terminate the same as of December 31 in any year by giving the other party ninety days written notice of termination.

[fol. 33] 9. In the event of the imminence or existence of war, hostilities or warlike operations between any Nations, blockades, embargoes, regulations of any government authority, or any official interference with commercial intercourse, affecting the operations of the Carriers, or any of them in the trade covered by this agreement, the Carriers or any one or more of them shall at their option have the right to cancel this agreement.

Members of:

North Atlantic Continental Freight Conference operating services from United States North Atlantic Ports:

A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line);

Black Diamond Steamship Corp. (Black Diamond Lines);

Compagnie Generale Transatlantique (French Line);

Compagnie Maritime Belge (Lloyd Royal) S. A.;

Cunard White Star Limited;

Dampskibsselskabet af 1912 A/S, A/S Dampskibsselskabet Svendborg, A. P. Moller, Maersk Line;

Ellerman's Wilson Line, Limited (Wilson Line);

N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland America Line);

South Atlantic Steamship Line, Inc.;

United States Lines Company (United States Lines);

Waterman Steamship Corporation.

The Canadian Continental Eastbound Freight Conference operating services from Canadian Ports Montreal and east thereof:

Canadian Shipowners Ltd., Montship Lines Ltd., (Canada Continental Line);

Canadian Pacific Steamships Limited;

Compagnie Generale Transatlantique (French Line);
County Line Ltd. (County Line);
Cunard White Star Limited (Cunard White Star Line);
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn" (Holland America Line);
Swedish American Line Continental Service (Swedish American Line);
Watts & Co. Ltd. (Watts Watts Line).

.....
(Signature of Merchant)

.....
(Signature for and on behalf of the above mentioned Steamship Lines)

Please return to North Atlantic Continental Freight Conference, 80 Broad Street, New York 4, N. Y.

APPENDIX B.

Specimen Contracts Introduced as Exhibits During Hearings of Alexander Committee.

Exhibit 26, Vol. I, p. 97.

Memorandum of freight contract made this 1st day of May, 1912, between the R. P. Houston & Co., party of the first part, and Messrs. Arkell & Douglas (Inc.), party of the second part, for their entire shipments from New York to Montevideo, La Plata, Buenos Aires, Rosario, and Bahia Blanca from date to April 30, 1913, included.

Party of the first part agrees to provide tonnage for all shipments which party of the second part has for shipment, provided reasonable notice of intention to ship (I say 20 days) is given, at the following rates of freight:

	Cents
1. Harvesters, headers, binders, header binders, reapers, mowers, hay rakes, drills, stackers, seed sowers, corn pickers, hand grain shellers and parts thereof, carts, harrows, plows (except traction engine gang plows)	16
2. Cleaners, hay presses, grain mills, grain planters, land rollers, pulverizers	18
3. Wheelbarrows, shovels, spades, hay forks	20
Chairs, desks, and common furniture	17½
4. Windmill material	19
5. Agricultural engines and thrashers, including gas engines, traction and gang plows:	
Up to 3 tons	20
Over 3 tons	22
6. Binder twine, per bale	28
7. Machinery, up to 2 tons	20
8. Lubricating oil (till Dec. 31)	15
9. Automobiles:	
Not exceeding 2 tons (till Dec. 31)	15
Over 2 tons (till Dec. 31)	18
10. Sewing machines (till Dec. 31)	14
11. General cargo not otherwise enumerated, current rates at time of shipment.	

All the above rates are to Montevideo and Buenos Aires and are per cubic foot or 56 pounds at steamer's option un-

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less otherwise specified and on pieces not over 2 tons weight unless otherwise specified, but it is understood and agreed that it is not permissible to separate parts of one machine or more of the same class—in other words, if part of a machine is taken at the measurement rate, the machine entire must be carried on this basis, the same with weight freight.

It is agreed that the rates of freight to Rosario and Bahia Blanca for all shipments irrespective of quantity by any steamer shall be 4 cents per cubic foot, or 56 pounds over the Buenos Aires rates, whether sailing direct or to Buenos Aires first. The rates to La Plata shall be 3 cents per cubic foot, or 56 pounds over the Buenos Aires rates.

The rate on binder twine to Rosario, Bahia Blanca, and La Plata shall be 6 cents per bale over the Buenos Aires rate.

Rates on goods not covered by above agreement weighing over 4,400 pounds are to be mutually agreed to between the parties hereto.

Parts of any of the above-mentioned articles to take the rate of the complete machine.

All freights to be prepaid.

All shipments are subject to the terms and conditions of the Houston Line's River Plate bills of lading.

Kerosene, naphtha, lumber, rosin, and other rough or dangerous cargo to be subject to special arrangement.

It is mutually agreed and understood that this contract covers the entire shipments of Messrs. Arkell & Douglass (Inc.), estimated to amount to about — tons from New York to the River Plate ports, and shipments shall only be made by steamers designated by R. P. Houston & Co.

It is further agreed that in case R. P. Houston & Co. reduce the rates of freight to any other shipper or shippers on any of the articles above mentioned during the period covered by this contract, then Messrs. Arkell & Douglas (Inc.) to be accorded the benefit of all such reductions during the period that said rates are reduced.

Exhibit 34, p. 247

New York, November 12, 1910

The Barber Asphalt Paving Co.
Land Title Building, Philadelphia, Pa.

Gentlemen: We beg to confirm contract made with you today for all shipments of asphalt and residuum (in custody

barrels) under your control from New York to Rio de Janeiro during the next three months, and contract to continue thereafter, subject to 30 days' notice by either party, on the following terms:

By steamers of the Prince Line and Hamburg South American Line and Hamburg American Line, $5.50 net.

By steamers of the Lamport & Holt Line, $5.50 net and 10 per cent primage.

All per ton of 2,240 pounds, gross weight; all prepaid on signing of bills of lading and free from alongside.

Please note that the following clause will be inserted in all bills of lading, to be signed by you, viz:

To be taken from alongside the steamer by consignees of goods at their own risk and expense immediately the steamer is ready to deliver. Consignees to send a competent representative, who will sign receipts for each lighter load before it leaves the steamer's side, otherwise the steamer will not be responsible for any claims on the cargo. In default the goods to be landed by the agents of the steamer at expense (including dock dues) and risk of the consignees.

In the event of the consignees failing to carry out this clause, the shipper shall be held, and hereby holds, himself responsible for all expenses incurred thereby.

We have written this letter in duplicate; kindly keep one and return the other approved by you.

Yours faithfully,

PAUL F. GERHARD & Co.
General Agents

Accepted by cable authority dated October 28, from Carlos A. de Miranda Jordao.

THE BARBER ASPHALT PAVING Co.

By F. J. BUXTON, Agents

Exhibit 34, p. 248

New York, January 21, 1910

Messrs. Guinle & Co.
New York City

Dear Sirs: We hereby beg to confirm freight agreement made with you by us, acting for the Prince Line, Lamport

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& Holt Line, and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service). This agreement to cover the transportation of your entire shipments of lawful merchandise from New York to ports in Brazil named below, on the following terms:

For Pernambuco, Rio de Janeiro, and Santos: Electrical and other machinery (electrical fittings), $7 per ton, weight or measurement, ship's option; transmission towers (structural material), $6 per ton, weight or measurement, ship's option; curved plates $6 per ton, weight or measurement, ship's option; car material, $6 per ton, weight or measurement, ship's option; paint and varnish, $7.50 per ton, weight or measurement, ship's option; copper wire, $7.50 per ton, weight or measurement, ship's option; lubricating oil, 15 cents per cubic foot—landed.

Above rates apply to pieces not exceeding 2 tons.

Pieces in excess of 2 tons to pay tariff rates for heavy lifts, less 10 per cent.

Locomotives up to 10 tons, 18 cents per cubic foot, F. F. A.

Bahia to pay above rates F. F. A. or $1.80 per ton additional if landed.

No F. F. A. bill of lading to be signed for less than 40 tons.

Goods not provided for in this agreement to pay tariff rates of steamer carrying the goods.

Rio Grande do Sul: To pay 25 per cent over the contract Rio de Janeiro landed rates, F. F. A.

Porto Alegre: To pay $4 per ton weight or measurement, ship's option, over Rio Grande do Sul rates; all landed.

Freight to be prepaid against delivery of bills of lading and not subject to any return whatsoever.

F. F. A. cargo to bear the usual signed clause in bills of lading.

Shipments by Prince Line and Hamburg Lines to be without primage.

Lamport & Holt Line to have option of charging 10 per cent primage in addition to the above rates.

The steamship lines agree to provide space on receipt of ample notice of your requirements by steamers of the Prince Line, Lamport & Holt Line and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service).

Pieces too large to go below deck to go on deck at shipper's risk.

It is further agreed that no single piece shall be tendered under this contract exceeding steamers' or ports' handling facilities.

Shipments subject to all conditions of companies' regular bills of lading.

This contract to run during the current month and the three following months and to run thereafter subject to 30 days' notice of withdrawal on the part of either party, but such notice not to be given before April 1, 1910.

Yours faithfully,

PAUL F. GERHARD & Co.
General Agents

Accepted:

Guinle & Co.

This contract was canceled December 6, 1910.

Exhibit 35, p. 249

New York, October 2, 1912

Messrs. Enoch Morgan Sons & Co.
439 West Street, New York City

Dear Sirs: We beg to confirm contract made with you today covering all your shipments of Sapolio, which you control (approximately 250 tons), hence to Montevideo and Buenos Aires, from date to January 31, 1913, inclusive, at the following rates of freight, viz: Montevideo, $10 net per ton; Buenos Aires, $11 net per ton.

All per ton of 40 cubic feet, or 2,240 pounds, steamer's option.

Freight is to be prepaid, and all shipments are subject to the terms and conditions of the regular carrying line's River Plata bills of lading.

We agree that in case the rate of freight on Sapolio is reduced you are to receive the benefit of such reduced rates during the period of such reduction.

Yours faithfully,

PAUL F. GERHARD & Co.
Per F. SCHARDING
General Agents

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Exhibit 34, p. 251

New York, May 31, 1912

The Ansonio Clock Co.
99 John Street, New York City

Gentlemen: We beg to confirm contract made with you today covering all your shipments of clocks (approximately 10,000-15,000 cubic feet) hence to Montevideo, Buenos Aires, and Rosario from date to April 30, 1913, inclusive, at the following rates of freight, viz: Montevideo, 25 cents per cubic foot; Buenos Aires, 27½ cents per cubic foot; Rosario, 31½ cents per cubic foot.

All freight is to be prepaid and all shipments subject to terms and conditions of the regular carrying line's River Plata bill of lading.

We agree that in case the Prince Line reduce the rates of freight to any other shipper or shippers on clocks you are to receive the benefit of such reduced rates during the period of such reduction.

Yours faithfully,

PAUL F. GERHARD & CO.
Per H. CONNOR
General Agents

Accepted:

THE ANSONIA CLOCK CO.
RAYMOND J. SCHWEIZER

Exhibit 34, p. 251

Memorandum of freight contract made this 28th day of May, 1912, between Paul F. Gerhard & Co., agents of Prince Line, party of the first part, and Messrs. Heywood Bros. & Wakefield Co., party of the second part, for their entire shipments of lawful merchandise, which they control, from New York to Montevideo, Buenos Aires, and Rosario from date to April 30, 1913, inclusive, for which the party of the first part agrees to provide tonnage, provided reasonable notice is given.

Rates of freight as follows:

Cane and wood seat and folding chairs, children's vehicles, bentwood chairs, rattan mats, chair cane, car seats, woven cane web seating, reed and rattan specialties, Montevideo, 17½ cents; Buenos Aires, 17½ cents; Rosario, 21½ cents.

All per cubic foot; all freight prepaid; all shipments subject to the carrying line's regular bill of lading.

Other articles to be charged at current tariff rates.

It is further agreed that in case the Prince Line reduces the rates of freight to any other shipper or shippers on any articles named in this contract the party of the second part shall have the benefit of such reduced rates during the period of such reduction.

PAUL F. GERHARD & Co.
Agents of Prince Line

HEYWOOD BROTHERS & WAKEFIELD Co.
HENRY H. MORRELL

Exhibit 34, p. 258

Memorandum of freight contract, made this 20th day of September, 1911, between Paul F. Gerhard & Co., agents for the Prince Line, party of the first part, and Brown Portable Elevator Co., party of the second part, for their entire shipments of portable elevators from New York to Montevideo, Buenos Aires, and Rosario from date to May 1, 1912, inclusive, at the following rates of freight, viz:

To Montevideo and Buenos Aires, $8 per ton; to Rosario, $9.60 per ton.

All the above per ton of 40 cubic feet, or 2,240 pounds, steamer's option, prepaid as customary, and no package to exceed 2 tons in weight.

The Prince Line agree to furnish not less than one steamer per month; all shipments subject to terms and conditions of the regular Prince Line bill of lading.

PAUL F. GERHARD & Co.

Per H. CONNOR
General Agents Prince Line

Accepted.

THE BROWN PORTABLE ELEVATOR Co.

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APPENDIX C.

Sections 14 and 15, Shipping Act, 1916.

SEC. 14 (46 U. S. C. 812). That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 15 (46 U. S. C. 814). That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision [sic]

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of the Act approved July second, eighteen hundred and ninety, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

APPENDIX D.

Excerpt from "Summary of Conferences and Agreements", Alexander Committee Report, Vol. IV, pp. 287-292.

II. *Meeting the competition of lines outside of the conference.*—While the conference lines regulate competition between themselves through one or more of the above-mentioned methods, and agree not to aid or encourage a nonconference line, nearly all the agreements which do not contain a deferred rebate system make no direct reference to the methods which should be adopted for meeting the competition of outside lines, this matter apparently being reserved entirely for conference action. In this respect the agreements frequently provide that the signatories must take joint action to defend their mutual interests in the event of competition from other lines. Three methods seem to have been adopted to accomplish this purpose, viz:

1. *Deferred rebate systems*, whereby shippers, who agree to employ exclusively the steamers of the conference lines in a given trade, are allowed a rebate of a certain percentage of their freight payments (usually 5 or 10 per cent), which rebate is computed for a designated period (usually every three, six, or twelve months), but which is not paid until after a certain number of months (usually six months) following the period for which it is computed, and only on the condition that during the entire time, including both the period for which the rebate was computed as well as the time of deferment, the shipper has given his *exclusive* support to the conference lines. Since the time of payment of the rebate follows the period for which it is computed, the shipper, if he desires to obtain the rebate, is under constant obligations to the conference lines, and is prevented from patronizing any other service since that act would mean the forfeiture of all accumulated rebates. Judging from the facts produced in the foregoing pages, this method has proved by far the most effective device for the control of a trade, and is being used principally in the long-distance trades (such as, for example, the westbound trade from the Orient[1] and most South American ports[2])

[1] Chapter V, p. 118.

[2] Chapter VI, pp. 153-188.

where the regular lines feel that they can assure to shippers a regular and efficient service only on condition of exclusive support. The system has proved especially effective where American importers are also importers in Europe and the same conference lines serve both the American and European trade, and where (as in the coffee trade from Brazil to Europe and the United States[1]) the deferred rebate agreement stipulates that the payment of the rebates is dependent upon the shippers' exclusive use of the conference lines for all shipments destined to either the United States or Europe, thus making it impossible for an independent line to secure freight unless it stands in a position to protect the shipper in both his American and European shipments. Moreover, as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates but could be penalized by being denied accommodations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times. In other words, the conference lines, by rotating the sailings of their steamers, can give a regular and frequent service, whereas the independent line with its fewer steamers can only offer sailing at less frequent intervals.

With the exception of the rebates to Bermuda, Martinique and Guadeloupe[2] (where, however, the rebates are not deferred, but depend upon the size of the shipper's total shipments), the deferred rebate systems now in use are equally open to all shippers who agree to give exclusive patronage, and are granted without discrimination as regards the size of individual or total shipments. Moreover, nearly all the rebate systems apply only to the American import trade, only four instances having been found where such rebates are granted in the export traffic from American ports, viz, in the New York-Bermuda, Martinique and Guadeloupe trade (which, as noted, are not strictly deferred),[2] in the New York-Colombian trade,[3] in the New

[1] Chapter VI, pp. 157, 158.

[2] Ch. VIII, p. 219-221.

[3] Ch. VI, p. 178.

York-Kingston (Jamaica) trade,[4] and in the trade from the United Kingdom to certain American-Pacific coast ports.[5] With reference to the American export trade it seems that the lines are laboring under the assumption that deferred rebates are illegal; and in some cases where such rebates formerly existed they have been abandoned, and where their adoption has been taken under consideration, a decision was reached not to establish the same. In the import trade, on the contrary, the lines appear to go on the theory that this country has no jurisdiction over the matter, and that such rebates may be freely granted if the arrangement is made abroad and if the rebates are paid at a foreign port. But in this connection it should be noted that the deferred rebate system, although applied only to the import traffic, is, nevertheless, a very effective device for the control of the trade, since to make the trade profitable an independent line must have cargo in both directions.

2. The use of fighting ships, or collective competition against a single competing line.—To what extent this practice prevails at present is difficult to ascertain, practically all of the steamship line representatives who testified before the Committee having denied the existence of the practice. But the facts obtained by the Committee show clearly that this method has been used in recent years. Thus, in the North Atlantic passenger traffic, the evidence presented in the suit against the Hamburg-American Line et al. shows that in about the year 1908 the conference lines authorized the appointment of a committee for the purpose of selecting fighting steamers to destroy the competition of nonconference lines. This committee, according to the evidence, would select suitable steamers from any of the conference lines to sail on the same days and between the same ports, the regular rates being reduced to a point sufficiently low to secure the traffic. As already stated in this volume (p. 46) "the evidence in the Government's suit shows that such opposition sailings were repeatedly instituted against certain independent lines. * * * Any surplus of passengers which were booked for the fighting steamer, but which could not be carried by the same,

[4] Ch. VIII, p. 215.

[5] Ch. II, p. 89.

would be transferred to other conference line steamers at the reduced rates. The expenses and loss from the lower rates, resulting to any line whose vessels had been selected, were distributed over the members of the conference. It was thus a case of all the lines, united in conference, opposing every sailing of a single opposition line. By distributing the loss over the several members of the conference, each constituent line would suffer proportionately much less than the one line which was fighting the entire group, and which would inevitably soon exhaust its resources in the conflict with the combined power of the large lines with their superior speed and better third-class accommodations." Again, in the freight traffic, it appears that six leading German lines established a "fighting corporation," called the Syndikats-Rhederei, the shares of which were opportioned among the various lines with reference to the tonnage of the companies. This fighting corporation was organized toward the close of 1905, and according to the report of Mr. Robert P. Skinner, American Consul General at Hamburg, "four comparatively small and inexpensive steamers were purchased, and these, with such others as may be chartered from time to time, are hired out to the six owners of the company to meet dangerous competition and to drive it away. The fighting ships handle chiefly bulk goods, leaving merchandise which requires prompt transportation to the care of the parent company, which maintains its nominal rates as far as possible, the stress of competition being borne by the fighting ships principally. In times of peace the fighting ships engage in regular trade on time charters. As this corporation is not one for profit primarily, the investment in reality, is a new sort of insurance." (Vol. 3, pp. 53-54.) Mr. W. G. Sickel, Vice-Director in charge of the Hamburg-American Line, testified before the Committee that "it is a well-known fact that the Syndikats-Rhederi does exist," and that he believed that its purpose is as stated above. (Vol. 2, p. 826.)

3. *Contracts with shippers which may be classified as:*

(*a*) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the

shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e, are willing at all times to contract with all shippers on the same terms.

(*b*) *Contracts made by the individaul members of the conference,* which are open to small and large shippers alike, irrespective of the size of the shipment. According to this type of contract (illustrated by the conference lines in the New York-River Plate trade[1]) each line makes its own contracts with shippers and assumes sole liability for the fulfillment of the same. The shipper agrees to give the steamship line his *entire* shipments to certain designated ports during a definite period, and the line obligates itself to provide tonnage at definitely prescribed rates for all shipments offered, provided reasonable notice of intention to ship is given. The contract expressly provides that the entire shipments of the shipper can only be sent by the steamers of the contracting line, or "by steamers designated by the contracting line," thus implying that while each line makes its own contracts with shippers, the line when obliged to designate some other line's steamer as per the terms of the contract, would not go outside of the conference. If the line reduces its rates to any other shipper during the period of the agreement it is usually provided that the shipper with whom the contract was made should be given the benefit of all such reductions during the period that the lower rates remain in force. While there is nothing in these contracts that implies liberty on the part of the merchant to ship by any other line than the one he is contracting with, as a matter of fact, the shipper, it was asserted by witnesses, is allowed to ship by any of the other conference lines working in harmony with the line which made the contract. In a number of cases conference lines make both joint and individual contracts with shippers. Thus, in the New York-Brazil trade freight contracts for a specific sailing or for a period not exceeding three months, are made by each line for its own steamers and on its own responsibility; but all contracts which extend beyond the three months, or which involve a very large

[1] Chap. VI, pp. 172-173.

volume of freight, are usually joint contracts, i. e., made by one line on behalf of all the lines, each line assuming one-third liability and the shipper having agreed, as previously stated, to confine his entire shipments of merchandise to the conference lines.[1]

(*c*) *Contracts with large shippers either for all their freight or for certain important articles forming the main basis in a given trade, at lower rates than those charged on similar goods, if shipped in small quantities.*—In the trade from New York to the West Coast of South America, via the Strait of Magellan, the lines carry much of the freight under informal contracts for firms which have large interests on the West Coast of South America. These firms are given a fixed rate per ton for a specified period on all their shipments in bulk, the rate applying to the entire consignment of merchandise without regard to the rates which would be charged on particular articles if offered separately for shipment, with the result that the average contract rate on articles included in the large bulk consignment might be lower than the rates applying to the same articles when sent by exporters who are unable to furnish large combination cargoes. The representative of one of these lines testified that the United States Steel Corporation, for example, was granted rates about 15 per cent below the rates granted to other shippers because of the very large tonnage offered (pp. 186, 187). Again, the trade between New York and Guadeloupe, Martinique, and Bermuda furnishes another illustration, the ultimate rate of freight in this trade being arranged on a sliding scale based upon the quantity shipped. Since the quantity can not be ascertained in advance, an adjustment is made at stated periods for the purpose of allowing the shipper a refund on the rates which he paid when the freight was offered, and the size of the refund depends upon the quantity shipped. The shipper agrees to send all of his freight by the contracting line, guaranteeing a minimum quantity, and the rebate represents the difference between the freight paid and the actual freight as computed on the basis of the quantity shipped. The rebate, however, is paid only on the condition that the shipper has faithfully carried out all the terms of the agreement pertaining to the minimum quantity of freight guaranteed, the shipment of all freight by the line, etc. (pp. 219, 220).

[1] Ch. VI, p. 160.